In The

Supreme Court of the United States

HAROLD B. WILLEY, Cl

October Term, 1953

PHILLIPS PETROLEUM COMPANY,

Petitioner,

v.

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN; CITY OF DETROIT, MICHIGAN; CITY OF KANSAS CITY, MISSOURI; CITY OF MILWAUKEE, a municipal corporation; COUNTY OF WAYNE, MICHIGAN; and THE FEDERAL POWER COMMISSION,

Respondents.

STATE OF TEXAS AND THE RAILROAD COMMISSION OF TEXAS; CORPORATION COMMISSION OF OKLAHOMA; and STATE OF NEW MEXICO AND OIL CONSERVATION COMMISSION OF NEW MEXICO,

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Respondents.

FEDERAL POWER COMMISSION,

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Respondents.

Joint Brief of Respondents State of Wisconsin, Public Service Commission of Wisconsin, Cities of Detroit, Michigan, Kansas City, Missouri, Milwaukee, Wisconsin, and County of Wayne, Michigan

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OPINIONS BELOW

The opinion and order of the Federal Power Commission (FPC) (R. V. 1682-1835) with the dissenting opinion of Commissioner Buchanan is reported in 90 P. U. R. (N. S.) 325 and 10 F. P. C. 246. The opinion of the Court of Appeals (R. 1857-1873) is reported in 205 F. 2d 706.

JURISDICTION

The jurisdictional requisites are adequately set forth in the briefs for the petitioners.

QUESTION PRESENTED

Whether one of the largest sellers of natural gas in the nation admittedly engaged in making sales for resale in interstate commerce, and transporting said gas in interstate commerce, so as to make such activities beyond the constitutional powers of the states but within the express jurisdictional language of the Natural Gas Act, can escape federal regulation requiring that its charges be just and reasonable, by claiming that a clause making the Act inapplicable to production or gathering of natural gas, encompasses such sales and transportation.

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STATEMENT OF THE CASE

(1) *The natural gas operations of Phillips Petroleum Company.*

(a) *In general.* There is no dispute as to the manner in which Phillips Petroleum Company actually operates its natural gas business. It is engaged in carrying natural gas in progressively large diameter pipe lines from wells in Oklahoma, Texas, and New Mexico to 10 processing plants[1] located in Texas and New Mexico where sulphur, water, dust, or similar foreign matter, as well as certain hydro carbons, are removed. After processing the residue gas is carried distances ranging from 240 to ~~1460~~ 1490 feet[2] in pipe lines from the processing plant where it is delivered and sold in interstate commerce for resale to 5 interstate pipeline companies, which pipeline companies in turn carry the gas in pipe lines for resale to many distributing companies supplying the ultimate consumer in the States of Arizona, California, Oklahoma, Kansas, Nebraska, Iowa, Minnesota, Missouri, Illinois, Indiana, Michigan, Ohio, South Dakota, Wisconsin, and the Province of Ontario, Canada. At least 49 principal cities are served with gas purchased by these interstate pipe line companies from Phillips, including the cities of Akron, Toledo, Cleveland, Detroit, Milwaukee, Minneapolis and St. Paul, Des Moines, Omaha, Kansas City, Missouri, San Francisco, Los Angeles, and San Diego. Exhibit 1-A, R. III. 753-754; R. II. 621; R. I. 285-286; R. V. 1692-1711, 1827-1934. A map (Exhibit I-A,

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[1]This figure is based upon record herein. Note FPC statement that Phillips has 25 plants plus an interest in 10 more. FPC brief p. 7.

[2]R. V. 1696, 1708.

R. III. 755; R. II. 621) showing interstate pipe lines and areas supplied by Phillips identified as item III, is included in the Appendix to this brief.

If not the largest, Phillips is one of the largest producers of natural gas in the United States. Phillips sells more natural gas to companies reporting to the Federal Power Commission than any other company. R. II. 739. Its 1949 annual report to stockholders recites its resources of natural gas are generally recognized as being the largest held by any company in the country. R. I. 151. On December 31, 1949 Phillips owned or controlled by contract 15.22 trillion cubic feet of proved gas reserves. R. V. 1689. Phillips' 1950 report to stockholders states the volume of gas sales reached a record level in 1950. Excluding company requirements, sales to outside purchasers totaled 504 billion cubic feet; with company use added, the total was 630 billion cubic feet, an average of more than 1.7 billion cubic feet a day. Gross income from these sales to outside purchasers was 26 million dollars. R. I. 153. The specific figures appear in Exhibits 54 and 55, R. III. 1053, 1069; R. I. 303. In 1950 total outside sales of natural gas by Phillips was 499,699,396 thousand cubic feet (Mcf.), of which 324,500,988 Mcf. was sold to companies reporting to the FPC as natural gas companies. In 1949 the comparable figures were 416,273,797 Mcf. and 220,881,579 Mcf., respectively. In 1950 the average price per Mcf. was 5.16 cents and in 1949 was 4.90 cents.

The five pipeline companies to which Phillips sells and delivers gas, as shown by the record here, the name

and location of the gasoline plant at which gas is processed, and volumes sold and delivered is as follows:

Name	Gasoline Plant and State Where Located[3]	Volumes Sold in Mcf. 1949	[4] 1950
Michigan-Wisconsin Pipe-Line Company	Sherman, Texas	9,894,001	77,153,738
Panhandle Eastern Pipe-Line Company	Hansford Texas) Sneed, Texas)	67,928,205	64,207,253
El Paso Natural Gas Company	Dumas, Texas) Crane, Texas) Eunice, New Mexico) Fullerton, Texas) Goldsmith, Texas)	88,204,611	126,134,113
Independent Natural Gas Company, for Northern Natural Gas Company	Gray, Texas	12,453,753	13,723,822
Cities Service Gas Company	Edmond, Oklahoma) Hunton, Oklahoma) Trindle, Oklahoma)	16,691,371	17,966,098

A map showing the location of the aforesaid gasoline plants and principal pipe lines leading to and from them is set forth as item IV in the Appendix to this brief. This map appears in the record along with diagrams showing the schematic layout of the various gasoline plants and also the points of delivery to the various interstate pipe lines as Appendix A(1) and A(2) (R. V. 1823, 1824) following the dissenting opinion of Commissioner Buchanan.

Gas supplied through the Sherman, Hansford, Sneed, Dumas, and Gray Plants comes from gas wells in the Hugoton Field in Oklahoma and Texas or the East or West Panhandle Fields in Texas. Gas supplied through the

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[3]The data as to name and location of gasoline plants is taken from the opinion of the FPC. R. V. 1692, 1695, 1697, 1699, 1703, 1705, 1710, 1711.

[4]The data as to volumes of gas sold is taken from Exhibits 54 and 55. R. III. 1053, 1069; R. I. 303. The volumes shown are total sales to the companies named and in certain instances include sales of gas other than that processed at the gasoline plants listed.

Crane, Eunice, Fullerton, and Goldsmith Plants is substantially all casing head gas, which is natural gas produced with oil (R. V. 1699) which comes from the Permian Basin in Texas and New Mexico. R. V. 1691-1709. Gas sold to Cities Service is casing head gas which comes from the Edmond and West Edmond Fields in Oklahoma. R. V. 1710-1711.

(b) *The final comingling of gas from the different lines takes place in each case no later than in the processing plant.* This is an admitted fact. FPC brief, p. 8; Phillips brief, p. 7. There are also instances where gas is carried in large diameter pipes in constant volumes to the processing plant for considerable distances with no connections in or out of said lines for the last several miles before reaching the plant, and the FPC so found. R. V. 1743. Examples appear in the FPC opinion (R. V. 1692-1693, 1697, 1700, 1703). Two such pipe lines cross the Oklahoma-Texas state line enroute to the Sherman Plant. R. V. 1692-3. For map showing these and other lines, see item IV, Appendix to this brief.

(c) *Phillips is also a wholesaler of natural gas purchased by it from other producers.* The gas processed at said gasoline plants includes not only gas produced by Phillips, but also a considerable volume purchased by Phillips from others, i.e., about 50%. This is an admitted fact. FPC brief, p. 7. As an example, of the average daily volume of 362,997 Mcf. processed in the Sherman plant for delivery to Michigan-Wisconsin Pipe Line Company in the month of March 1951, 204,724 Mcf. or 56%, was gas Phillips purchased from 9 other companies. Exhibit 79, R. IV. 1213; R. I. 345.

As another example in February 1951 Phillips purchased gas from others as follows:

Name of Plant	Gas Produced by Phillips (M.C.F.)	Gas Purchased from Others by Phillips (M.C.F.)	Total (M.C.F.)	% of Total Supply Purchased from Others
Dumas and Sneed	11,840,408	3,229,616	15,070,024	21.43%
Crane	5,438	964,344	969,782	99.44
Fullerton	516,516	1,010,109	1,326,625	76.14
Eunice	69,618	3,158,815	3,228,433	97.84
Goldsmith	829,311	2,370,334	3,199,645	74.08
Hansford	3,154,024	....	3,154,024	....
Gray	1,676,000	1,030,357	2,705,357	38.07
North	10,322	219,973	230,295	95.52

(Source of above figures Exhibits 181, 182, 183 and 184 R. V. 1640-4 Admitted FPC record 5470. Volumes are in MCF)

(d) *There is a continuous and uninterrupted flow of natural gas in interstate commerce from the wells to the ultimate consumer.*[3] It appears without dispute that the natural gas which Phillips delivers to the 5 interstate pipeline companies in normal operations moves in a continuous and uninterrupted flow from the producing wells through the various pipe lines of increasing diameter to the various gasoline plants and then to the point of delivery and sale to the pipeline companies. R. I. 200-202, 257-260, 315-317, 320-323; R. III. 626-627.

This continuous and uninterrupted flow of natural gas in interstate commerce then continues from the point of delivery and sale to the interstate pipeline companies in the States of Texas and New Mexico across state lines to

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[3]In **Michigan-Wisconsin Pipe Line Co. v. Calvert, et al.**, 347 U. S. 157, 163, this Court said "The entire movement of the gas, from producing wells through the Phillips gasoline plant and into the Michigan-Wisconsin pipeline to consumers outside Texas, is a steady and continuous flow. All of Michigan-Wisconsin's gas is purchased from Phillips for transportation to points outside Texas, and is in fact so transported."

areas of ultimate consumption in the States of Arizona, California, Oklahoma, Kansas, Missouri, Nebraska, Iowa, Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, and the Province of Ontario, Canada. This is established by a *stipulation* of facts entered into by the parties, including Phillips. R. V. 1827-1834; R. II. 679. There is also a continuous and uninterrupted flow in interstate commerce of gas from the facilities of Phillips in Oklahoma to those of Cities Service Gas Company and then into lines of various distributing companies in other states, including Kansas City, Missouri. R. I. 287.

Said stipulation also establishes that prior to and at all times since the date of the first contract with said pipeline companies, Phillips knew that that the gas to be delivered to each would be transported to areas of ultimate consumption in other states. R. V. 1829, 1830-1831, 1832, 1833-1834.

(e) *Phillips Petroleum Company conceded that its sales of natural gas to the 5 interstate pipeline companies are sales in interstate commerce for resale.* In its brief submitted to the FPC (page 38) Pillips stated it "* * * does not contend that the sales to the five pipeline companies * * * are not sales in interstate commerce." This concession is recognized by the FPC in its opinion. R. V. 1712, 1740.

(f) *The FPC found (1) that the sales of natural gas by Phillips to the 5 pipeline companies are sales in interstate commerce for resale for ultimate public consumption, and (2) that Phillips is engaged in the transportation of natural gas in interstate commerce.* In its opinion the majority of the FPC states (R. V. 1712):

"* * * For it [Phillips] correctly concedes that the sales involved here are sales in interstate commerce for resale. Nor can there be any doubt that Phillips' movement of that gas from the points of production to the points of sale constitutes transportation in interstate commerce as a matter of constitutional law. Indeed, this is in part implicit in Phillips' concession respecting the sales."

Again (R. V. 1740):

"* * * It [Phillips] concedes, and on the record here it could not deny, that the sales involved are sales 'in interstate commerce of natural gas for resale for ultimate public consumption' within Section 1(b)'s affirmatively stated coverage of the Act when considered independently of the exemption of production and gathering. Also, its operations clearly include the 'transportation of natural gas in interstate commerce,' similarly within that affirmatively stated coverage when considered independently of the exemption of production and gathering."

(2) *The undisputed facts negative any conflict between the regulatory efforts of the FPC and those of regulatory agencies of the States of Texas, New Mexico and Oklahoma.*

The FPC has regulated companies reporting to it as "natural gas companies" which are engaged in producing and processing natural gas in Texas, Oklahoma, and New Mexico. R. II. 539-540, 479-80, 482-6, 505-8, 576-87, 696-8, 727. Despite this the record shows no actual conflict between the FPC regulation and state regulatory efforts. R. II. 696-699. No witness for the states claimed any con-

flict had taken place, but to the contrary, their testimony confirmed that there had been no conflict. R. II. 478-489, 505-508, 539-546, 550-551, 576-587, 612.

The States called as witnesses on this subject Messrs. W. J. Murray, Jr., a member of the Texas Railroad Commission (R. II. 383), Jack K. Baumel, chief engineer of said Commission (R. II. 375), Elmer Capshaw, an engineer employed by Oklahoma Corporation Commission (R. II, 602), Ray C. Jones, a member of said Commission (R. II. 607), and Richard R. Spurrier, state geologist and secretary of the New Mexico Oil Conservation Commission (R. II. 521).

Mr. Murray testified that the primary concern of the Texas Commission was conservation of oil and natural gas, and testified at considerable length as to what was done to avoid waste and promote conservation of natural gas. Basically, the solution is to first reduce flaring of natural gas, especially casing head gas, to a minimum and obtain a maximum recovery of gas from the wells. The various methods followed to accomplish this and the reasons therefor appear in the record. R. II. 388-401. He also detailed specific types of regulation promulgated by the Texas Commission such as relate to drilling, spacing of wells, fixing of allowables and proration whereby the amount of gas that may be produced from each well is fixed. R. II. 385-386. The witness testified that price played a part in conservation, both of casing head and dry well gas. As to the latter he asserted a higher price increased the incentive to obtain maximum recovery of gas in the ground. R. II. 437-439. The building of interstate pipe lines such as that of El Paso Natural Gas Company which

provides a market for casing head gas also plays a vital part in its conservation. R. II. 492-493.

When the time came to point to specific actual conflicts, none were shown. Mr. Murray stated there were three *possible* conflicts based upon an *assumption* that if the FPC took jurisdiction over a particular company which had certain gas reserves dedicated to a particular pipeline company, a conflict could exist if the FPC were to insist that the first company was to draw on said reserves and the Texas Commission were to require said company (1) to take its "allowables" from some other field, (2) to use casing head gas ahead of gas from gas wells in said reserves, (3) to pump the gas from said reserves back into the ground for repressuring. R. II. 412-413, 419-422. The witness was further asked to assume that a certain producer was required to utilize casing head gas to prevent flaring and to further assume the FPC was to step in and lower the price of the gas, and then answer whether the producer would find it economically feasible to discontinue utilization of the casing head gas. R. II. 450. The witness expressed disbelief in correctness of the assumptions (R. II. 451-452) but after considerable discussion and after a further question which assumed that the producer "could not comply with that order as a result of having been regulated by some outside agency that would materially interfere with your conservation problems," answered the question "yes." R. II. 452. The witness was further asked to assume that such a company was required to get a certificate of public convenience from the FPC to build a pipe line to comply with an order of the Texas Commission requiring utilization of casing head gas and to prevent its flaring. R. II. 466-468. Then in response to a question whether a "con-

flict" would exist, the witness finally said if the Texas order had a certain date for compliance and the FPC had not yet given its authority there would be a conflict. He also stated to his knowledge they had had no such instance like this. R. II. 470.

On cross-examination Mr. Murray completely negatives the basis of any conflict. With respect to his testimony on direct concerning "conflict" based on hypothetical questions he stated "I may be completely in error. None of the types of regulation that we have discussed might result. * * *" R. II. 477-478. He was asked specifically to state whether there had been any conflict between regulation of the Texas Commission and that of the FPC with respect to specific companies producing and processing gas in Texas reporting to the latter as "natural gas companies," namely, Canadian River Gas Company, Panhandle Eastern Pipe Line Company, Cities Service Gas Company, Lone Star Gas Company, and Texoma Natural Gas Company and other companies, and stated there had been none. R. II. 478-485, 505-508. Murray stated he knew of no case where the FPC had attempted to interfere with Texas regulation, and "we are under no real apprehension that you will." R. II. 505-506.

Murray also conceded that there are no conservation conditions now or in the foreseeable future which would interfere with the allowables set by the allocation and proration orders in the Texas-Hugoton Field. R. II. 509. Murray claimed no authority for the Texas Commission to fix a minimum price for gas and said that "we don't want it." R. II. 465. He also conceded that when monopoly conditions arose state regulation was necessary and "I would

consider the same would apply on an interstate operation, *that it would have to be regulated.*" R. II. 510. (Emphasis ours.)

By reason of a statement in the FPC brief, p. 86 to the effect that Commissioner Murray summarized his testimony by asserting that there is no jurisdiction the FPC might take over Phillips without conflict resulting, citing R. II. 478-9, we direct attention to the specific questions and answers as follows which disprove that statement in the FPC brief (R. II. 478-9):

"Q. (Interrupting) You think that? You think there would be that conflict?

"A. I may be completely in error. None of the types of regulations that we have discussed might result, but knowing no more about the Federal Power Commission's intention or responsibilities than I do, my presumption has been and it is purely a presumption that if they did take jurisdiction it would be for the purpose of issuing regulations of the sort that have been described to me in these questions, and if those regulations of that sort were issued, I do believe that conflict would result.

"Q. In other words, your answers were not general answers but with the specific answers to the questions you had before you at the time you made your answer?

"A. Yes, sir; even though they were making specific assumptions, they were still rather general, but not so general as to say if the Federal Power Commission takes any jurisdiction over Phillips would a conflict result, and I never did intend to say any jurisdiction would result.

"Q. You mean any conflict would result?

"A. That is right, if they took any jurisdiction, but I can't quite conceive, I may be in error, of what jurisdiction they would take over Phillips without conflict resulting."

Mr. Baumel was also questioned regarding the existence of any "conflict" between regulation by the Texas Commission and that of the FPC concerning said producers doing business in Texas who report to the FPC. He stated there had been no conflict. R. II. 576-587. He also denied giving any testimony to the effect there would be a conflict if Phillips were declared a "natural gas company" (R. II. 582), and further that if the FPC regulated the rate for the sale of natural gas by Phillips at the Sherman plant "it wouldn't interfere with our allocation and proration orders, no." R. II. 591.

Mr. Jones of the Oklahoma Corporation Commission stated that the chief reason for said Commission's intervention was because it "feels" that if the FPC assumed jurisdiction it would regulate "rates" which "might" interfere with orders of the Oklahoma Commission fixing a minimum price for gas at the well head in the Guymon-Field. R. II. 609. On cross-examination he admitted that if the rate set by the FPC was higher than the Oklahoma well head minimum, he could think of no interference with the jurisdiction of the Oklahoma Commission and did not then know of any other possible conflict. R. II. 612.

Mr. Spurrier of New Mexico asserted first that price played a part in the conservation of gas in that a higher price tended to reduce the amount of flaring and also resulted in wells being kept in production for a longer period.

He also admitted that the availability of a market furnished by the construction of an interstate pipe line played an equally important part along with price. R. II. 548. No minimum price at the well head had ever been fixed, assuming the New Mexico Commission had jurisdiction to do so. R. II. 532-533.

The only testimony given by Spurrier as to any "conflict" was in response to hypothetical questions based on assumptions which compelled the desired answer. Thus, at one point he was asked to assume the FPC attempted to take jurisdiction "over producers and gatherers of gas *as to well spacing*, would that conflict?" The answer very naturally was "it certainly would." R. II. 535. A similar type of question with a similar type of assumption was also asked and answered at R. II. 536. He was also asked whether there would be a conflict if the FPC fixes the price of gas to producers and gatherers of gas in New Mexico, which question was again answered "yes." R. II. 539. On cross-examination Spurrier admitted that the El Paso Natural Gas Company and Southern Union Gas Company (both of whom report to the FPC as natural gas companies) (R. II. 698-699, 726-727) complied in all respects with the rules and regulations of the New Mexico Oil Conservation Commission. R. II. 539-540. Further questioning confirmed that there had been no conflict between FPC and New Mexico regulation over these two companies. The witness stated, "I have never heard of any conflict." R. II. 543. Further testimony showing absence of conflict appears at R. II. 544, 546, 550-551. The witness concluded by indicating that if there was no conflict as to these companies there would be none if the FPC were to regulate Phillips. R. II. 551-552.

STATUTE INVOLVED

The statute involved is the Natural Gas Act (Act of June 21, 1938, ch. 556, 52 Stat. 821, as amended by Act of February 7, 1942, ch. 49, 56 Stat. 83, and Act of July 25, 1947, ch. 333, 61 Stat. 459, 15 U. S. C. §§717-717w), the material portions of which are printed in item I of the Appendix to this brief.

SUMMARY OF ARGUMENT

I.

Phillips is one of the largest sellers of natural gas in the nation. It is a producer, gatherer, transporter, and wholesaler of this product, controlling 15.22 trillion cubic feet of proven gas reserves. Its properties include 4,380 miles of pipe lines and 25 processing plants (10 more partially owned) in Arkansas, Kansas, Oklahoma, Texas and New Mexico. Phillips admits and the FPC found that in carrying on its natural gas business, Phillips sells natural gas in interstate commerce for resale for ultimate public consumption in 49 principal cities located in 14 states. It sells more gas to natural gas companies reporting to the FPC than any other company. About 50% of the gas it sells is produced by others. The sales occur after production and gathering have been completed. Phillips, as the FPC found, is also engaged in transportation of natural gas in interstate commerce. Both of these activities bring it squarely within the affirmative jurisdictional provisions of Section 1(b) of the Natural Gas Act, and each of said

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activities make it a "natural gas company" as defined in Section 2(6) of said Act.

The issue is whether Phillips, having thus brought itself within the affirmative jurisdictional provisions of the Act by voluntarily engaging in such activities, can escape FPC jurisdiction to determine whether its charges for gas sold are unjust, unreasonable or unduly discriminatory, by claiming that said sales are a part of "production or gathering" within the purview of the exemption portion of Section 1(b) of the Act.

II.

The admitted sales by Phillips of natural gas in interstate commerce for resale are beyond the constitutional powers of the states to regulate, even in absence of Congressional action. *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298, and *Public Utilities Comm. v. Attleboro Steam & Electric Co.*, 273 U. S. 83, and subsequent decisions. The identical House and Senate Committee Reports on the bill (H. R. 6586) which became the Natural Gas Act (H. R. Rep. No. 709, 75th Cong., 1st Sess.; S. Rep. No. 1162, 75th Cong., 1st Sess.) take cognizance of the regulatory "gap" thus created and establish first, that the basic purpose of Congress in passing the Act was to occupy this field in which this Court has held that the states may not act, and to thus completely close the regulatory "gap," so as to protect the ultimate consumer by effective federal regulation coordinating precisely with state regulation. Second, in denying the Federal Power Commission jurisdiction over "production or gathering" of natural gas, Congress intended only to preserve in the states, regulatory power in areas in which

they are constitutionally competent to act. Because sales for resale in interstate commerce are beyond the constitutional competence of the states, it follows that such sales cannot, as a matter of constitutional law, be included within the exempt activities, "production or gathering of natural gas," under the provisions of Section 1(b). *Interstate Natural Gas Co. v. Federal Power Comm.*, 331 U. S. 682, 689-690. The regulation of rates at which Phillips sells gas for resale in interstate commerce to the 5 pipe line companies here involved is a matter of national concern when the magnitude of Phillips' operations and the impact of its charges upon the millions of consumers located in 49 principal cities spread over 14 states is considered.

The identical House and Senate Committee Reports above mentioned also specifically state that matters within the affirmative jurisdictional provisions of Section 1(b) of the Act (i.e., "transportation of natural gas in interstate commerce" and "sale in interstate commerce of natural gas for resale for ultimate public consumption") are not within the negative exemption, "production or gathering of natural gas." Cases adopting this view are *Colorado Interstate Gas Co. v. Federal Power Comm.*, 324 U. S. 581, 598, 602-3; *Interstate Natural Gas Co. v. Federal Power Comm.*, (C. A. 5) 156 F. 2d 949 (1946) 951, affirmed 331 U. S. 682; *Peoples Natural Gas Co. v. Federal Power Comm.*, 75 App. D. C. 235, 127 F. 2d 153 (1942), certiorari denied 316 U. S. 700.

While the foregoing propositions of constitutional law make it unnecessary to so contend, Phillips' sales for resale in interstate commerce take place in fact *after* "production and gathering" of natural gas have been completed.

The statements of the FPC that such sales are the end product of production or gathering, or at least an exempt incident thereof are pure conclusions of law based on bare assertion coupled with faulty reasoning which proceeds thus: production and gathering is a means to an end, therefore everything done to arrive at that end is "production and gathering." The end, in effect, is claimed to be included in the means to the end. Such reasoning assumes as true the conclusion to be reached.

The fact that the sales for resale in interstate commerce by Phillips to Michigan-Wisconsin Pipe Line Company take place after production, gathering and processing have ended, is also confirmed by *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157.

III.

Petitioners' contentions (1) that the only sales within the constitutional "gap" are sales for resale in interstate commerce made by a pipe line company to distribution companies, and that sales made by a company like Phillips to a pipe line company at the production end of the line are exempt; and (2) that in enacting the Natural Gas Act, Congress intended only to regulate the sales for resale in interstate commerce by a pipe line company to a local distribution company are without merit.

Such contentions run directly counter to *Interstate Natural Gas Co. v. Federal Power Comm.*, 331 U. S. 682, involving sales for resale in interstate commerce "made in the *field*" (emphasis ours) by Interstate to 3 pipe line companies. This Court held that such sales were beyond the con-

stitutional competence of the States to regulate; that their regulation was predominately a matter of national, as contrasted to local, concern; that unreasonable charges exacted at this stage of the interstate movement would be perpetuated in large part in fixed items of costs which would be passed on to the subsequent purchasers including the ultimate consumer. "It was to avoid such situations the Natural Gas Act was passed."

Such contentions also run counter to *Peoples Natural Gas Co. v. Federal Power Comm.*, 75 App. D. C. 235, 127 F. 2d 153 (1942), certiorari denied 316 U. S. 700, where it was held, the affirmative jurisdictional provision language of Section 1(b) of the Act relating to sales for resale in interstate commerce "exactly covered" the sale for resale in interstate commerce in the State of production to the pipe line company, and on rehearing (p. 157 *et seq.*, 127 F. 2d) that the statutory language covered sales in the State the gas originates as well as the State of destination.

These cases correctly delineate the constitutional "gap" and affirm Congress' intention to include within the scope of the Natural Gas Act sales for resale in interstate commerce in the *producing* as well as the receiving states. Congress' intent is further evidenced (1) by identical House and Senate Committee Reports on H. R. 6586 which became the Natural Gas Act (H. R. Rep. No. 709, 75th Cong., 1st Sess.; S. Rep. No. 1162, 75th Cong., 1st Sess.); (2) by statements by Senator Wheeler, manager of the bill on debate in 81 Cong. Rec. 9314 (footnote 36, p. 63, FPC brief) and 83 Cong. Rec. 2422-2424, and (3) by other material cited in this brief, including the Federal Trade Commission Report of 1935.

IV.

Petitioners attempt to resort to legislative history of predecessor bills despite the fact that this court refused to review it again in 1949. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 498. In any event any proper study of the legislative history of the Acts should be confined to a determination of Congressional intent as shown in the identical House and Senate Committee Reports on H. R. 6586 (Natural Gas Act), H. R. Rep. 709, 75th Cong., 1st Sess., S. Rep. No. 1162, 75th Cong., 1st Sess. (reproduced in full pp. 52-70 of the Appendix to this brief).

Petitioners' main reliance is on H. R. 11662, 74th Cong., 2nd Sess., and testimony of Dozier DeVane, a former Solicitor of the FPC concerning the scope of the bill. This was a predecessor bill having jurisdictional provisions differing materially from H. R. 6586, 75th Cong., 1st Sess., which became the Natural Gas Act. H. R. 11662 applied only to transportation in high pressure mains in interstate commerce and contained no language such as that in H. R. 6586 giving FPC jurisdiction not only over "transportation of natural gas in interstate commerce" but also over "sales in interstate commerce of natural gas for resale." As shown by the identical Senate and House Committee Reports, this latter language was deliberately inserted to close the constitutional "gap" arising from the constitutional inability of States to regulate sales for resale in interstate commerce.

The DeVane statements on H. R. 11662 have been presented to this and other Courts and have been rejected or not followed in cases cited at pp. 55-6 of this brief.

In any event the DeVane statements do not refer to sales for resale in interstate commerce such as those by Phillips to the 5 interstate pipe lines here involved. From their context, it is clear that at most they referred to sales at the wellhead. In fact, on the basis of the DeVane testimony, Phillips, as a purchaser of large quantities of gas from others, which it sells for resale, would have been subject to FPC jurisdiction even under H. R. 11662.

Petitioners next resort to the transparent expediency of "defining Phillips out of the Act" by employing a self-serving definition of the term "gathering" which they assert *includes* the enormous sales of natural gas for resale in interstate commerce *after* the physical "gathering" has been completed. By thus "defining" gathering as embracing sales, they come to the erroneous conclusion that the sales are *outside* the regulatory gap. To give such self-serving definition the exalted function of overruling clear statutory language, clearly expressed legislative purpose, and a decision of this Court, is rather a novel idea to say the least. Not even opinions of legislators expressed years after the adoption of acts which they authored are accepted as authoritative by the courts. *United States v. United Mine Workers*, 330 U. S. 258, 281.

In addition to being directly contrary to the clearly expressed Congressional intent, the definition used by petitioners is contrary to the common and accepted meaning of the word, and also as it is used in the industry according to recognized texts and dictionary definitions. Further, the opinion testimony of Phillips' employes is contrary in substance to the opinions expressed by the many industry supporters of the Moore-Rizley (H. R. 4051, 80th Cong.) and Kerr (S. 1498, 81st Cong.) bills. And finally their opinions

are flatly contrary to the opinion of the FPC in the *Interstate* case, 3 F.P.C. 416, 420-1, where sales in interstate commerce were distinguished from production or gathering. The opinions of these employes are also contrary to the definitions given by the FPC in its brief in this Court in the *Interstate* case.

V.

The doctrine of administrative construction cannot be invoked to work a result contrary to the plain provisions of the statute, a result sought by petitioners here. But in any event, the FPC has never adopted a consistent view on the question here presented to entitle its interpretation to any weight whatsoever. The FPC acknowledges this in its brief in this case when it says, pp. 71-72:

> "Notwithstanding this uniform course of interpretation revealed by decided Commission cases, *there has been some uncertainty as to the applicability of the 'gathering' exception to the situation here involved.* * * *" (Emphasis supplied.)

This is confirmed by authority cited pp. 60-62 this brief, including *Interstate Natural Gas Co.*, 3 F.P.C. 416 (1943) 420-421, which takes a position squarely contrary to that of the FPC here. The fact is that the FPC theory in the *Interstate* case (see quotation p. 61 this brief) fully supports our position here.

Also, in the debate on the Kerr Bill (S. 1498, 81st Cong., 2nd Sess.) Senator O'Mahoney stated that "the Federal Power Commission has wobbled all over the face of the earth with respect to this problem." 96 Cong. Rec. 4171.

VI.

The final claim is that FPC jurisdiction is excluded because of alleged conflict with State regulatory efforts based on a *dictum* in *Interstate Natural Gas Co. v. Federal Power Comm.*, 331 U. S. 682, 690, which is inapplicable here because, when read in context, the language relied on refers only to sales which the States are constitutionally competent to regulate consistent with the Commerce Clause. Hence such language would not apply to sales for resale in interstate commerce by Phillips to the 5 pipe line companies, since such sales are beyond the constitutional competence of the States to regulate. In the Court of Appeals, the FPC relied on this language. It does not do so now, a significant indication it does not believe in the soundness of such contention.

In any event, the Court has said a conflict must be clearly shown, as exceptions to the primary grant of jurisdiction are to be strictly construed (*Interstate Natural Gas Co. v. Federal Power Comm.*, 331 U. S. 682, 690) and where there are no opposing directives, it is unnecessary to resolve conflicting claims between State and Federal regulation. *Panhandle Eastern Pipe Line Co. v. Michigan P. S. Comm.*, 341 U. S. 329, 336.

The record here shows no opposing directives and while there is much conjecture and speculation, the record is crystal clear that there is no actual conflict in fact.

In essence, the entire claim of conflict is based on the proposition that conservation of gas depends upon price, and if FPC were to fix a rate for the sales of natural gas for resale in interstate commerce to the 5 interstate pipe

line companies, the fixing of such a rate would affect State conservation efforts. The decision of the FPC was based on that proposition. The claim is identical to that rejected in *Federal Power Comm. v. Hope Natural Gas Company*, 320 U. S. 591, 607-609, 613-614; *Colorado-Interstate Gas Co. v. Federal Power Comm.*, 324 U. S. 581, 600, 603. At most, until FPC fixes an actual *rate*, we are simply talking about possibilities and no sufficient conflict is shown to prevent or avoid FPC jurisdiction as a matter of law.

ARGUMENT

I.

THE ACTIVITIES OF PHILLIPS PETROLEUM COMPANY FALL WITHIN THE AFFIRMATIVE JURISDICTIONAL PROVISIONS OF SECTION 1(b) AND IT IS A NATURAL GAS COMPANY AS DEFINED IN SECTION 2(6) OF THE NATURAL GAS ACT.

a. The question involved concerns the status of Phillips in light of its specific acts and transactions. There is no attempt in this case to try the natural gas industry or to determine the status of all claiming to be "independent producers and gatherers."

The question is whether Phillips is a "natural gas company" as defined by Section 2(6) of the Natural Gas Act. The answer depends upon whether it engages in acts or transactions which bring it within the jurisdictional provisions of Section 1(b) of that Act and, if it does, whether

such acts are within the negative language of that section excluding FPC jurisdiction over "production or gathering of natural gas." The issue is, therefore, much narrower than petitioners attempt to make it appear that this case involves the question whether the so-called "independent producer and gatherer" and sales for resale made by the so-called "independent producer and gatherer" are subject to FPC jurisdiction under the Natural Gas Act. (Phillips brief, p. 18; FPC brief, p. 20.)

There is no attempt in this case to try the natural gas industry or determine the status of all claiming to be "independent producers and gatherers." The record in this case concerns only Phillips, and to go beyond that would result in giving an advisory opinion upon hypothetical facts.

Reduced to its bare essentials the position of petitioners is that the Natural Gas Act was never intended to apply to "independent producers and gatherers" or sales of natural gas in interstate commerce for resale made by them; that Phillips is an "independent producer and gatherer" from which petitioners contend that it follows that Phillips is not subject to FPC jurisdiction under the Natural Gas Act.

The term "independent producer and gatherer" is not defined in the Natural Gas Act. Neither is it a designation having a commonly understood meaning as a legal term. It is a manufactured or self-coined term couched in some of the words of that portion of Section 1(b) of the Act which excludes FPC jurisdiction over the activities of "production or gathering of natural gas." This might lead the uncritical to the erroneous conclusion that a company to

which such a label is applied engages, as a matter of fact, only in the exempt activities of "production or gathering of natural gas." But the most claimed for its meaning by petitioners, who presume to define it, is that an "independent producer and gatherer" is one who is neither affiliated with nor owned by a pipe line company. See Phillips brief, p. 4; FPC brief, p. 6. Such a definition obviously lacks precision, and it is clearly apparent that a company which is neither affiliated with nor owned by a pipe-line company could still be engaged in making sales for resale in interstate commerce or in doing other acts which would make it a natural gas company as defined in the Natural Gas Act. Petitioners' designation "independent producers and gatherers" is not based on, or related to activities which are jurisdictional under the Natural Gas Act.

Hence, it does not follow that Phillips is exempt from FPC jurisdiction because it claims the label "independent producer and gatherer." Just because of this self-serving designation it cannot be assumed it does not engage in any act or transaction making it a natural gas company as defined in the Act. Rather the specific acts and transactions engaged in by it must be examined. This we now proceed to do.

b. FPC findings make Phillips a "natural gas company" under the Act.

The Power Commission found (a) that the sales by Phillips to the 5 interstate pipeline companies are sales in interstate commerce of natural gas for resale for ultimate public consumption, and (b) that Phillips is engaged

in transportation of natural gas in interstate commerce, both within the affirmative jurisdictional provisions of Sec. tion 1(b) of the Act.* R. V. 1712, 1740. Either or both make Phillips a "natural gas company" as defined in Section 2(6) of the Natural Gas Act. *Federal Power Comm. v. East Ohio Gas Co.*, 338 U. S. 464, 468.

c. *The admitted sales for resale in interstate commerce by Phillips cannot as a matter of constitutional law fall within the statutory exemption over "production or gathering of natural gas." Petitioners fail to face up to and meet this decisive constitutional question.*

The sales for resale in interstate commerce to the five interstate pipeline companies cannot as a matter of law fall within the portion of Section 1(b) of the Natural Gas Act which provides the provisions of said Act shall not apply "to the production or gathering of natural gas."

The basic issue is one of statutory construction, i.e. what did Congress intend to include in the words "production or gathering of natural gas." The answer has heretofore been supplied by this Court. It is based on the constitutional doctrine that sales for resale in interstate commerce are beyond the constitutional powers of the states to regulate, even in the absence of Congressional action. The answer follows. By reason of this constitutional doctrine, the sales here involved could not be included within the words "production or gathering of natural gas." A fair consideration of the issue in this case imposes

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*The exact language of the FPC is quoted pages 8-9, ante.

the obligation on petitioners to meet the constitutional question. Nowhere have petitioners met this obligation and faced this issue squarely. Their ommission in this respect is not without significance. In *Interstate Natural Gas Co. v. Federal Power Comm.*, 331 U. S. 682, this Court said the issue involves the jurisdiction of the FPC "to regulate sales made in the field by petitioner [Interstate] to three pipeline companies, each of which transports the gas so purchased to markets in States other than Louisiana." 331 U. S. 682, 684. The company claimed *inter alia* such sales for resale were a part of "production and gathering of natural gas" and hence not subject to FPC jurisdiction. This Court said pages 689-690:

> "The Company contends, however, that regardless of whether the sales in question are in interstate commerce, those transactions fall within the clause of section 1(b) specifically excepting from the Commission's jurisdiction regulation of '* * * the production or gathering of natural gas.' In evaluating that contention we should not lose sight of the objectives sought to be accomplished by Congress in passing the Natural Gas Act.
>
> "In a series of decisions announced prior to the passage of the act, this Court had held that, although Congress had not acted, the regulation of wholesale rates of gas and electrical energy moving in interstate commerce is beyond the constitutional powers of the States." Petitioner, relying in part upon the principles established by those cases, has successfully avoided regulation by the Louisiana Public Service Commission."
>
> As was stated in the House Committee report, *the 'basic purpose' of Congress in passing the Natural Gas Act was to 'occupy this field in which the Supreme*

Court has held that the States may not act."[13] In denying the Federal Power Commission jurisdiction to regulate the production or gathering of natural gas, it was not the purpose of Congress to free companies such as petitioner from effective public control. *The purpose of that restriction was, rather, to preserve in the States powers of regulation in areas in which the States are constitutionally competent to act. * * **" (Emphasis ours.)

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[13]**Missouri v. Kansas Natural Gas Co.**, 265 U. S. 298 (1924); **Public Utilities Comm'n v. Attleboro Steam & Electric Co.**, 273 U. S. 83 (1927); **State Corp. Comm'n. v. Wichita Gas Co.**, 290 U. S. 561 (1934).

"[14]See note 9, supra.

"[15]H. R. Rep. No. 709, 75th Cong., 1st Sess., 2."

It follows as a matter of law from the language quoted above and particularly that in italics, that the sales for resale in interstate commerce involved in the instant case by Phillips to the 5 interstate pipeline companies cannot be included in "production or gathering of natural gas" as those words are used in Section 1(b) of the Natural Gas Act, since such wholesale sales are beyond the constitutional competence of the States to regulate.[7] The cases

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[7]The proposition that the Natural Gas Act was designed to give the FPC jurisdiction over matters including sales for resale of natural gas in interstate commerce which the states could not constitutionally regulate under the Commerce Clause has been emphasized by this court in cases before and subsequent to **Interstate Natural Gas Co. v. Federal Power Comm., supra.** The cases are: **Illinois Natural Gas Co. v. Central Ill. Public Service Co.**, 314 U. S. 498; **Federal Power Comm. v. Hope Natural Gas Co.**, 320 U. S. 591, 609-10; **Colorado Interstate Gas Co. v. Federal Power Comm.**, 324 U. S. 581, 599-600; **Panhandle Eastern Pipe Line Co. v. Public Service Comm. of Indiana**, 332 U. S. 507, 516; **Federal Power Comm. v. Panhandle Eastern Pipe Line Co.**, 337 U. S. 498, 502-4; **Panhandle**

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above cited by the Court in the *Interstate* case so hold and in addition the Court in the *Interstate* case, said with reference to the sales in the field by Interstate to the 3 interstate pipeline companies therein involved for resale, (331 U. S. 682, 692-693):

> "* * * We have held that these sales are in interstate commerce. It cannot be doubted that their regulation is predominately a matter of national, as contrasted to local concern. All the gas sold in these transactions is destined for consumption in States other than Louisiana. Unreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas, including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed."

For the same reason, we submit that the regulation of the rates Phillips charges the 5 interstate pipeline companies for gas sold them for resale is a matter of national and not local concern. This conclusion is compelled by the

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Eastern Pipe Line Co. v. Michigan Public Service Comm., 341 U. S. 329, 334-335. In **United States v. Public Utilities Comm. of California**, 345 U. S. 295, referring to Part II of the Federal Power Act and the **Attleboro** case (**Public Utilities Comm. v. Attleboro Steam & Electric Co.**, 273 U. S. 83), it is said, page 311:

> "Part II is a direct result of Attleboro. They are to be read together. The latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales. Discussion of the constitutional problem as reflected in that statute and the Natural Gas Act in recent cases supports this conclusion. Especially in the litigation arising under the Gas Act has this Court expressed the view that the limitations established on Commission jurisdiction therein were designed to coordinate precisely with those constitutionally imposed on the states. * * *"

nature and magnitude of the operations by Phillips and the impact of its charges upon the consuming public in distant states. The principal facts are stated on pages 3-8, *ante*. It is there pointed out that Phillips is one of the largest, if not the largest supplier of natural gas in the country, claiming in 1949 the largest reserves in the country, with total sales of 499,699,366 Mcf. in 1950. R. I. 151; R. V. 1689. The 5 interstate pipeline companies to which Phillips sells natural gas transport and resell that gas to distributing companies located in 14 states ranging from California on the west to Michigan and Ohio on the east and Minnesota on the north, plus the province of Ontario, Canada, including 49 of the principal cities of the country such as Detroit, Cleveland, Akron, Toledo, Milwaukee, Minneapolis and St. Paul, Omaha, Kansas City, Missouri, San Francisco, Los Angeles and San Diego. Phillips is the sole supplier of gas for Michigan-Wisconsin Pipe Line Company, which serves distributing companies in Missouri, Iowa, Michigan and Wisconsin. R. V. 1692-1711, 1827-1834; R. I. 285-286; Exhibit 1-A, R. III. 753-755; R. II. 621. Natural gas Phillips sells Michigan- Wisconsin Pipe Line Company and Panhandle Eastern Pipe Line Company supplies consumer markets with a population of about 12 million people. *Michigan-Wisconsin Pipe Line Company v. Calvert*, 347 U. S. 157, 162, n. 3.

Recognition that these sales for resale in interstate commerce here involved are not a local activity is also found in *Michigan-Wisconsin Pipe Line Co. v. Calvert, supra*, where the Court, speaking about the Texas tax on the "taking" of gas from Phillips by Michigan-Wisconsin, said, p. 167:

> "* * * But receipt of the gas in the pipeline is more than its 'taking'; from a practical standpoint it is its 'taking off' in appellants' carrier into commerce; in reality the tax is, therefore, on the exit of the gas from the State. This economic process is inherently unsusceptible of division into a distinct *local activity* capable of forming the basis for the tax here imposed, on the one hand, and a separate movement in commerce, on the other. * * *" (Emphasis ours.)

This holding is especially pertinent here when it is considered that the point of "taking" is a part of (and at the identical point) of the sales for resale in interstate commerce by Phillips to Michigan-Wisconsin which are relied on, among others, to establish jurisdiction in the instant case.

The only possible effective regulation of the rate at which Phillips sells natural gas to the 5 interstate pipeline companies would be at the national level. State regulatory commissions such as the Public Service Commission of Wisconsin, which fix the rate at which local distributing companies such as Milwaukee Gas Light Company (which buys gas from Michigan-Wisconsin Pipe Line Company, which purchases its sole supply of gas from Phillips) sell to the ultimate consumer, would be unable because of the existence of state lines to make any effective inquiry and determination as to the reasonableness of the rate at which Phillips sells to the pipeline company in the State of Texas. The situation is recognized in the *Attleboro* case (*Public Utilities Comm. v. Attleboro Steam & Electric Co.*, 273 U. S. 83), where the company generating electricity and selling it for resale was in Rhode Island and the company

buying the energy and selling it to the ultimate consumer was in Massachusetts. The Court said, page 90:

> "* * * Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character. The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress. * * *"

The primary purpose of the Natural Gas Act was to protect the ultimate consumer by *effective* regulation. *Panhandle Eastern Pipe Line Co. v. Public Service Comm. of Indiana,* 332 U. S. 507, 520. The Natural Gas Act was designed to close any gap in the regulatory scheme. In H. R. 709, 75th Congress, 1st Session, the House Committee on Interstate and Foreign Commerce said with respect to H. R. 6586, which became the Natural Gas Act, (page 3):

> "Your committee believes that this legislation is highly desirable to fill the gap in regulation that now exists by reason of the lack of authority of the State commissions."

If the judgment below is reversed the "gap" Congress intended to close will be revived and this court will have reversed the long line of cases above cited and relied on by the Court in the *Interstate* case (and other cases cited *supra* p. 30 footnote 7) which hold that sales of natural gas or electric energy in interstate commerce for resale, of the character involved in this case, are beyond the constitutional powers of the states to regulate, even in the absence of Congressional action.

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The recent case of *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, also supports the position that the sales for resale here involved are beyond the constitutional competence of the states. It involved the Texas "gathering tax" which was designed to avoid taxing the sale of natural gas for resale from Phillips to Michigan-Wisconsin but attempted to carve the "taking" of the gas by Michigan-Wisconsin from the sale and to tax the "taking" of the gas. The Court held that the sale could not thus be separated into parts and struck down the tax because of its conflict with the Commerce Clause. Obviously any attempt to tax the sale would also be a prohibited interference with interstate commerce.

Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U. S. 179, is distinguishable. This case sustained an order of the Oklahoma Corporation Commission fixing a minimum price of 7-cents Mcf. *at the well head* in the Guymon-Hugoton Field on the ground the state had a legitimate local interest in the conservation of natural gas. We submit the case does not hold that the states can constitutionally regulate sales of natural gas in interstate commerce for resale, such as are involved in the sales by Phillips to the 5 pipeline companies here involved. *No such question was before the court.* The fact that at page 186 of 340 U. S. the court referred to and applied the doctrine of the *Cooley* case (*Cooley v. Port Wardens*, 12 How. (U. S.) 299 is a clear recognition that the particular regulatory effect there involved was a matter of "local" concern and hence not in the same category as the sales for resale by Phillips to the 5 pipeline companies here involved. For reasons stated pages 30-34, *ante*, such sales for resale have always been regarded as being of national concern and affecting

the national interest and hence beyond the constitutional power of the states even in absence of Congressional action.

Further, this Court in the aforesaid case clearly limited the effect of its decision by stating (340 U. S. 179, 188):

> "Appellant does not contend that the orders conflict with the Federal authority asserted by the Natural Gas Act, 52 Stat. 821 (1938), 15 U. S. C. §717 *et seq.* (1948). The Federal Power Commission has not participated in these proceedings. Whether the Gas Act authorizes the Power Commission to set field prices on sales by independent producers, or leaves that function to the states, is not before this Court."

Finally, this Court in *Federal Power Comm. v. East Ohio Gas Co.*, 338 U. S. 464, states that irrespective of any changes in constitutional law since the enactment of the Natural Gas Act, the scope of said Gas Act must be determined by the "gap" as it existed at the time of its enactment. Thus it is said, page 472 of 338 U. S.:

> "* * * But *prior* constitutional decisions, not what we have since decided or would decide today, form the measure of the gap which Congress intended to close by this Act. *Illinois Gas Co. v. Public Service Co.*, 314 U. S. 498, 508; and see *Parker v. Motor Boat Sales*, 314 U. S. 244, 250."

d. The sales for resale involved as a matter of fact take place after completion of "production or gathering."

There is no dispute as to the nature and location of the physical plant owned and operated by Phillips and how it is operated. The conclusions of the majority of the FPC reached at R. V. 1742-44 to the effect the sales by Phillips to the five interstate pipeline companies for resale in interstate commerce are "the end product of production and gathering" and "part of Phillips' gathering business, or at least an exempt incident thereof" are based upon bare assertion coupled with fallacious reasoning which goes as follows: "production and gathering" is a means to an end, therefore every thing that is done to arrive at that end is part of "production and gathering." R. V. 1742-44. Such reasoning assumes as true the conclusion attempted to be proved.

In any event these so-called "findings of fact" made by the majority of the FPC on this point are pure conclusions of law. The situation here is even stronger than that in *United States v. Appalachian E. P. Co.*, 311 U. S. 377, where the ultimate question was whether a certain stream was navigable. The Court said, p. 403, there was no real disagreement as to the physical and historical evidentiary facts but there was disagreement over the ultimate conclusion of navigability to be drawn therefrom. The Court refused to apply the rule that this was a fact case where the findings had been concurred in by two courts and hence would be accepted by the Supreme Court in the absence of clear error. The Court said (p. 404) the case must be decided in the light of the previous decisions and particular cir-

cumstances presented by the particular river involved, and continued:

> "* * * To these circumstances certain judicial standards are to be applied for determining whether the complex of the conditions in respect to its capacity for use in interstate commerce render it a navigable stream within the constitutional requirements. Both the standards and the ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied."

The reviewing court is free to review not only conclusions of law, but also determinations of mixed law and fact made by an administrative tribunal. *Bogardus v. Commissioner of Internal Revenue*, 302 U. S. 34, 38-9:

> "The Board of Tax Appeals concluded that, from a careful consideration of all the evidence, 'the payments made by Unopco to the petitioners and others were additional compensation in consideration of services rendered to Universal and were not tax-free gifts.' This, as we recently have pointed out, is 'a conclusion of law or at least a determination of a mixed question of law and fact. *It is to be distinguished from the findings of primary, evidentiary or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the board.' Helvering v. Tex-Penn Oil Co.*, 300 U .S. 481, 491; *Helvering v. Rankin*, 295 U. S. 123, 131. If the conclusion of the board be regarded as a determination of a mixed question of law and fact, it has, as we shall presently show, no support in the primary and evidentiary facts. The ultimate determination, therefore, should be overturned, under the doctrine of *Helvering v. Rankin, supra*, as a matter of law." (Emphasis supplied.)

It is conceded the final commingling of gas occurs in each case in the processing plant. Then after processing in the plant the gas is carried in pipes from 200 to 1490 feet where it is delivered and sold in interstate commerce for resale to the interstate pipeline companies for transportation and sale. Phillips brief, p. 7, 9; FPC brief, p. 8. The point of final commingling represents the ultimate point to which that gathering could possibly extend.[6] This is in accord with the common and accepted meaning of the word and also as used in the industry.[7] The FPC so advised this Court at page 31 of its brief in No. 733 October Term 1946, *Interstate Natural Gas Co. v. Federal Power Comm.* (331 U. S. 682). The FPC also advised the Court in its brief filed in the Fifth Circuit in the same case (Item V of the Appendix of this brief), pages 14-15 as follows:

> " 'Gathering' relates to the collecting of the gas from the various wells and bringing it into one place. Webster's new International Dictionary, 2nd Edition (1939) so defines the word and the trade or technical meaning

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[6]There are numerous situations where "gathering" ends prior to the time gas reaches the gasoline plant. Thus in several instances, as the FPC found (R. V. 1743), gas is carried in large diameter lines over distances to the processing plant with no gas injected or removed from said lines. R. V. 1743, 1692-3, 1697-8, 1700, 1703, 1707-8. This constitutes transportation and the FPC so found. R. 1740. For instance, Line H extends from a point in Oklahoma about 22 miles across the state line to the Sherman Plant in Texas. At a point 12½ miles out Line H-2 connects with Line H and from that point to the plant there are no other lines connecting with Line H. R. I. 171; R. V. 1692. Gas is thus transported 12½ miles in said pipe line with no volumes added or taken out. "Gathering" ends no later than when the last gas is injected into Line H. See R. II. 680-1 and also definitions cited above and at page 40, **post.**

[7]A complete discussion on the subject of whether Phillips' sales for resale in interstate commerce in fact take place after "gathering" ends appears in Commissioner Buchanan's dissent. R. V. 1774-85.

of the term is the same as its usual or popular meaning."

See also definitions of "gather" and "gathering" in Webster New International Dictionary, 2d Ed. (1946); Funk & Wagnall's New Standard Dictionary (1941).

In Petroleum Dictionary for Office, Field and Factory by Hollis P. Porter, 4th Ed., page 108, appears the following:

"*Gathering lines*: Pipes connecting production tanks at oil wells with trunk pipe lines. In natural and casing-head gas systems, the lines that connect with the wells and carry the gas to the main pipe lines."

Also in *"This Fascinating Oil Business"* by Max W. Ball it is indicated that the "gathering system" and "gathering" terminates far upstream from the gasoline plant, i.e. at the "main line" which carries the gas to the gasoline plant. Thus it is said p. 175:

"The initial pipe-line task is to get the oil from the lease tanks, scattered about the field on the various leases, to a central pump station at the beginning of the main line. This is done through 'gathering lines' from two inches to eight inches in diameter, * * *."

P. 178:

"The trunk line is to a pipe-line system what the main line is to a railroad, with the gathering system comparable to the spurs and sidings and the pump stations to the motive power. * * *"

From the examples given at footnote 8, p. 39, *ante* it is plain that there are numerous cases where gas is carried

in "trunk lines" over distances and constituting only "transportation."

Phillips asserts that the words "production or gathering" in Section 1(b) describe more than a physical activity and describe the performance of an economic function or the conduct of a business. The statutory language is *not* "production or gathering" but "production or gathering *of natural gas*" (emphasis ours) which cannot be anything other than a physical activity. The contention is also contrary to what this court has held. *Colorado Interstate Gas Co. v. Federal Power Comm.*, 324 U. S. 581, 602-3; *Interstate Natural Gas Co. v. Federal Power Comm.*, 331 U. S. 682. In the case last cited this court, in referring to Section 1(b), said page 690:

> "* * * Clearly, among the powers thus reserved to the States is the power to regulate the *physical production and gathering* of natural gas in the interests of conservation or of any other consideration of legitimate local concern." (Emphasis ours.)

The attempt to include the sales for resale by Phillips involved in this case as part of "gathering" is to say a legal transaction is part of a physical act. "Gathering" is a physical act whereby gas produced from a number of wells is assembled at a common point. But after the gas leaves the processing plant (which is the ultimate of "gathering"), it is carried in pipe lines to and past the point of delivery and sale, in a constant moving stream. All that happens is that there is a legal transaction whereby title of the gas passes to the purchaser. The physical act of assembling the gas has taken place and was completed long before.

e. The fact that the sales for resale by Phillips to Michigan-Wisconsin take place after production, gathering and processing is confirmed by the Texas Gathering Tax decision.

In *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, the Court held the Texas "gathering tax" unconstitutional because of conflict with the Commerce Clause. The taxable incident was the "taking" of the gas when delivered by Phillips to Michigan-Wisconsin following its discharge from the Sherman gasoline plant. This point of "taking" is at the identical point where sale for resale in interstate commerce by Phillips occurs, and is a part of the sales which are relied on to establish jurisdiction in this case. R. V. 1694.

In its opinion this Court said (p. 166-7):

"The problem in this case is not whether the State could tax the actual gathering of all gas whether transmitted in interstate commerce or not, cf. *Hope Natural Gas Co. v. Hall, supra*, but whether here the State has delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun. Cf. *Utah Power & Light Co. v. Pfost, supra.* The incidence of the tax here at issue, as stated by the Texas appellate court, is appellants' 'taking' of gas from Phillips' gasoline plant. *This event, as stipulated, occurs after the gas has been produced, gathered and processed by others than appellants.* The 'taking' into appellants' pipelines is solely for interstate transmission and the gas at that time is not only actually committed to but is moving in interstate commerce. What Texas seeks to tax is, therefore, more than merely the loading of an interstate carrier which was condemned in *Joseph*

v. Carter & Weekes Stevedoring Co., 330 U. S. 422, 427 (1947), for the gas here simultaneously enters the pipeline carrier and moves on continuously to its outside market. 'There is no break, no period of deliberation, but a steady flow ending as contemplated from the beginning beyond the state line.' * * *" (Emphasis ours.)

Also, (p. 169):

"* * * But the tax here is not levied on the capture or production of the gas, but rather on its taking into interstate commerce *after* production, gathering and processing. * * *

* * *

"But the processing, on which this tax is *not* imposed, was done by Phillips and took place prior to the taxable event of 'taking.' As for the interference of title passing, appellees readily admit this levy was designed to avoid taxing the sale; and we think that, as a basis for finding a separate local activity, the incidence must be a more substantial economic factor than the movement of the gas from a local outlet of one owner into the connecting interstate pipeline of another. Such an aspect of interstate transportation cannot be 'carve[d] out from what is an entire or integral economic process,' *Nippert v. Richmond, supra,* at 423, by legislative whimsy and segregated as a basis for the tax. The separation must be realistic."

Thus, it is clearly recognized that the point of "taking" is after production, gathering and processing have ceased. It follows that sales for resale in interstate commerce by Phillips take place after production, gathering and processing have ended.

f. Matters specified in the affirmative provisions of Section 1(b) are not within negative provision of that section.

As we have already noted pages 8-9, *ante*, the FPC found Phillips is engaged in (1) sales in interstate commerce of natural gas for resale for ultimate public consumption, and (2) transportation of natural gas in interstate commerce, both within the affirmatively stated coverage of Section 1(b) of the Act.

The sales for resale in interstate commerce referred to are those to the 5 interstate pipeline companies previously referred to. The transportation is that described by the FPC, where it said in its opinion (R. V. 1743):

> "* * * a number of the lines leading to the plants are of large diameter and that these include some of considerable lengths. We are also aware that, for the last several miles before reaching the plant, gas in some of these lines moves at a constant volume, there being no connections into or out from the lines. * * *"[10]

There is clear authority for the proposition that matters specified in the affirmative provisions of Section 1(b) are not included in the negative provisions of that section. Thus, in H. R. 709, 75th Congress, 1st Session, the House Committee on Interstate and Foreign Commerce report-

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[10]For specific examples of such lines and record references in support, see footnote (8), **ante**. The transportation takes place after the point where no gas is either injected or taken from the specific lines involved and hence involves a real carrying of natural gas in large volumes from one point to another for considerable distances and falls within the commonly accepted definition of the word "transportation." See **Cunard S. S. Co. v. Mellon**, 262 U. S. 100, 121-2.

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ing on H. R. 6586 (which became the Natural Gas Act) said, page 3:

> "In view of the importance of section 1(b), which states the scope of the act, it seems advisable to comment on certain provisions appearing therein. It will be noted that this subsection of the bill, after affirmatively stating the matters to which the act is to apply, contains a provision specifying what the act is not to apply to, as follows:
>
> > but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.
>
> "The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill. * * *"

In *Colorado Interstate Gas Co. v. Federal Power Comm.*, 324 U. S. 581, the Court, referring to Section 1(b) of the Natural Gas Act, said page 598:

> "* * * Transportation and sale do not include production or gathering. * * *"

P. 602-3:

> "That does not mean that the part of §1(b) which provides that the Act shall not apply 'to the production or gathering of natural gas' is given no meaning.

> Certainly that provision precludes the Commission from any control over the activity of producing or gathering natural gas. For example, it makes plain that the Commission has no control over the drilling and spacing of wells and the like. It may put other limitations on the Commission. * * *"

To the effect that the exception as to "production or gathering" in Section 1(b) does not include "sales in interstate commerce of natural gas for resale for ultimate public consumption," in the affirmative portion of that section, is *Interstate Natural Gas Co. v. Federal Power Comm.*, (C. A. 5) 156 F. 2d 949 (1946), 951, (affirmed, 331 U. S. 682).

In *Peoples Natural Gas Co. v. Federal Power Comm.*, 75 App. D. C. 235, 127 F. 2d 153 (1942), certiorari denied 316 U. S. 700. Peoples sold natural gas at its Pew compressor station in the state of Pennsylvania, which is the state where the gas was produced and gathered, to New York State Natural Gas Company, an affiliated company. The latter company in turn transported the gas into the state of New York where it was sold to others for resale in interstate commerce. The Court held (page 155 of 127 F. 2d) that the language in Section 1(b) of the Natural Gas Act making it apply to the sale in interstate commerce of natural gas for resale for ultimate public consumption "exactly covered" the sale from Peoples to New York State Natural Gas Company, and on rehearing (page 157, *et seq.* of 127 F. 2d) held the language covered sales in the state where the gas originates as well as sales in the state of destination.

The Court below in the instant case said that in the *Peoples* case it had held the portion of Section 1(b) that exempts production or gathering from FPC jurisdiction does not limit jurisdiction over sales for resale in interstate commerce. Thus, the decision of the Court of Appeals in the instant case states (R. 1862):

> "* * * And as the Fifth Circuit said, 'In *Peoples Natural Gas Co. v. Federal Power Comm.*, 75 U. S. App. D. C. 235, 127 F. 2d 153, the court found that a sale in Pennsylvania to an interstate pipeline company which immediately transported it to New York was a sale of natural gas in interstate commerce for resale, and, so finding, held that the provision that the act did not apply to production or gathering did not limit the commission's jurisdiction over such sales.' 156 F. 2d at 951-2.[1] * * *"

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[1]"The brief filed here for the Peoples Natural Gas Company raised the 'production and gathering' contention. We rejected it without mentioning it."

Thus, in its decision in the instant case, the Court of Appeals correctly rejected the contention that the Phillips' sales for resale within the affirmative provisions of Section 1(b) of the Act were within the exemption as to "production or gathering." The court said of this contention (R. 1864-5):

> "* * * If this were law neither the *Interstate Natural Gas* Case nor the *Colorado Interstate Gas* Case could have been decided as it was. For the sales of a producer and gatherer are necessarily and closely related to production and gathering. It does not follow that his bulk interstate sales are exempt from regulation under the Natural Gas Act. The cases we have cited, and §1(b) of the Act itself, show that such sales are

not exempt. Section 1(b) says the act shall apply 'to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale, . . . and to natural-gas companies engaged in such transportation or sale. . . .' It proceeds to exempt both 'local distribution' and 'production or gathering,' but it exempts nothing between 'production or gathering' and 'local distribution.' The exemption of production or gathering does not exempt sales made after production and gathering have been completed."

g. Resort to legislative history not necessary in view of Court's exhaustive treatment in prior decisions. In any event, the material relied on by petitions is improper and does not support their contentions.

Both Phillips and the FPC engage in a laborious review of alleged legislative history of the Natural Gas Act, relying *inter alia* on predecessor bills and comments thereon. We say this is neither necessary nor proper, as this Court has on many occasions reviewed the legislative history and in 1949 found it unnecessary to again go into the subject. In *Federal Power Comm. v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, this Court said, p. 502:

"Without entering upon another review of its legislative history,[3] suffice it to say that the Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution.[4] The jurisdiction of the Federal Power Com-

mission was to complement that of the state regulatory bodies. * * *

"The legislative history has been discussed by our prior opinions in **Panhandle Eastern Pipe Line Co. v. Public Service Comm'n of Indiana**, 332 U. S. 507, 514-521; **Interstate Natural Gas Co. v. Federal Power Comm'n**, 331 U. S. 682, 689-690; **Colorado Interstate Gas Co. v. Federal Power Comm'n**, 324 U. S. 581, 601-603; **Federal Power Comm'n v. Hope Natural Gas Co.**, 320 U. S. 591, 609-613; **Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.**, 314 U. S. 498, 506-508.

"See H. R. Rep. No. 2651, 74th Cong., 2d Sess., pp. 1-3; H. R. Rep. No. 709, 75th Cong., 1st Sess., pp. 1-4; S. Rep. No. 1162, 75th Cong., 1st Sess., pp. 1-3."

The legislative history (as discussed in the cases of this court above cited) fully supports our position in this case. See pages 29-31, this brief. But if it is necessary to again consider legislative history (which we deny), we submit petitioners not only rely on improper materials but they misconstrue such legislative history.

As is manifest from the prior decisions of this Court where it deemed it advisable to review the history of the Natural Gas Act, any proper study of the legislative history of said Act should be confined to a determination of Congressional intent as shown in the identical House and Senate Committee Reports (H. R. Rep. 709, 75th Cong., 1st Sess.; S. Rep. No. 1162, 75th Cong., 1st Sess.) on H. R. 6586 which became the Natural Gas Act. The Senate Committee Report is printed in the Appendix to this brief, pp. 52-70.

Referring to the specific material relied on by petitioners, we submit the following:

1. *The Federal Trade Commission Report of 1935.*[11]

Even the FPC in its opinion gives this report no weight in construing legislative history. The opinion mentions this report but says the enumeration of "Specific Evils Existing in the Natural Gas Industry" and its "Summary Statement of Recommendations" are "generally but not specifically helpful here." R. V. 1714.

In any event, while petitioners' briefs refer at length to this report, *they do not refer* to the portions which do not support their position. Thus, in Chapter XIII entitled "Conclusions and Recommendations," it is stated (p. 614):

> "Wholesale rates for gas delivered in interstate commerce should be regulated *in all cases,* as the States are without power to fix them (*Public Utilities Commission v. Attleboro Steam & Electric Co.,* 273 U. S. 83 (1927)). * * *" (Emphasis ours.)

And in Recommendation number 3 it is stated (pp. 616-617):

> "A Federal regulatory law should be enacted applicable to interstate natural gas pipe lines which transport gas for ultimate sale to and use by the public, *regulating contracts for purchase of gas to be transported interstate,* or regulating rates for carriage or city gate rates at the end of such transportation, or all of these. * * *" (Emphasis ours.)

It goes without saying that there can be no "purchases" of gas by the five pipe line companies for transportation interstate, without "sales" by Phillips. The "purchases" and "sales" are the identical transactions.

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[11]Senate Doc. 92, Pt. 84A, 70th Cong., 1st Session.

Thus the report demonstrates on its face the incorrectness of the following assertion in the FPC brief (page 35):

> "* * * Federal regulation was recommended for the intervening gap, interstate transmission and wholesale sales to local distributors."

Contrary to petitioners' contentions, the Federal Trade Commission Report did not contemplate any gap between state and federal regulation. At p. 612, in the discussion of remedies, it states:

> "There is a jurisdiction, either State or National, which covers the entire country. Federal jurisdiction plus the jurisdiction of the several states should be so utilized and coordinated as to produce effective regulation and the termination of existing abuses and leave no unregulated twilight zone. Otherwise our system fails in a very crucial situation."

It is impossible, as a matter of logic, to reconcile this statement with the contention of petitioners that Congress intended to leave a "twilight zone" (or "gap") in the regulatory process between the end of state and the beginning of federal regulation.

2. *Petitioners' main reliance is on the legislative history of H. R. 11662, a prior bill and materially different from H. R. 6586 which became the Natural Gas Act. Such material may not properly be relied on.*

While reference is made in the FPC brief (page 37, *et seq.*) to a number of predecessor bills, the main reliance is on H. R. 11662, 74th Cong., 2nd Session. This is the only

predecessor bill relied on by Phillips (brief p. 30). We submit this material cannot properly be relied upon in determining the legislative history of the Natural Gas Act because the jurisdictional provisions of H. R. 11662 differed materially from H. R. 6586 which became the Natural Gas Act.

The basis for the attempted reliance on H. R. 11662 as part of the legislative history of the Natural Gas Act stems from a statement in *Federal Power Comm. v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 498 (1949), 505, footnote 7, where *inter alia* the Court referred to H. R. 11662 as "an earlier bill substantially similar to the Natural Gas Act * * *." Inasmuch as the Court had earlier stated, p. 502 of 337 U. S., that it was not entering upon another review of the legislative history of the Natural Gas Act and p. 502 n. 2 that "*The* legislative history has been discussed in prior opinions," (emphasis ours) (see pp. 48, 49, *ante*, for quotation from case), we submit that in referring to H. R. 11662 it was not in an attempt to discuss anew the legislative history of the Natural Gas Act.

In any event, while the Court, speaking generally, noted H. R. 11662 and the bill that became the Natural Gas Act were substantially similar, a comparison of the specific jurisdictional provisions of H. R. 11662 and the bill which became the Natural Gas Act, clearly show material and significant differences. Specifically, the jurisdictional provisions of H. R. 11662 provided as follows:

> "Section 1(b) The provisions of this Act shall apply to the transportation of natural gas in high-pressure mains in interstate commerce and to natural-gas companies engaged in such transportation, but shall not apply to the distribution of natural gas moving locally

in low-pressure mains or to the facilities used for such distribution or to the production of natural gas; *Provided,* That nothing in this Act shall be construed to authorize the Commission to fix rates or charges for the sale of natural gas distributed locally in low-pressure mains or for the sale of natural gas for industrial use only."

Differing materially are the jurisdictional provisions of H. R. 6586, which became the Natural Gas Act, which provide:

"Section 1(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

It is thus plain that H. R. 11662 applied *only* to transportation of natural gas in high pressure mains in interstate commerce, while H. R. 6586, which became the Natural Gas Act, applied to (1) the transportation of natural gas in interstate commerce and (2) the sale in interstate commerce of natural gas for resale. *The latter provision was entirely absent from H. R. 6586.* The inclusion of the sale for resale provision was deliberate and based on constitutional grounds, as appears from the identical House and Senate Committee Reports. Thus in H. R. 709, 75th Cong., 1st Sess., after referring to the statutory language, it is said:

"* * * The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U. S. 23.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri v. Kansas Gas Co.*, (1924) 265 U. S. 298, and *Public Service Commission v. Attleboro Steam & Electric Co.*, (1927) 273 U. S. 83.) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act."

Also in the brief of the FPC in the 5th Circuit in the case of *Interstate Natural Gas Co. v. Federal Power Comm.* (see pp. 24-25 of that brief printed as item V in our Appendix to this brief), it is said:

"H. R. 11662, 74th Cong., 2d Sess., was introduced in the House of Representatives on March 6, 1936, by Representative Lea of California. It differed fundamentally from H. R. 6586 and from the Natural Gas Act in its jurisdictional provisions."

The brief of the FPC in opposition to certiorari in *Interstate Natural Gas Co. v. Federal Power Comm.*, 331 U. S. 682 (No. 733, October Term 1946, p. 13), also made

the same representation to this Court. (See p. 58 for quotation from brief.)

The DeVane statements concerning H. R. 11662 have been presented to this and to other courts and have been rejected. In *Interstate Natural Gas Co. v. Federal Power Comm.*, (CA 5) 156 F. 2d 949 (1946), affirmed 331 U. S. 682, the Court said, page 952:

> "A careful reading of petitioner's brief, especially of that portion of it devoted to the legislative history, shows that its difficulties flow from the fact that it does not distinguish between the Lea Bill, House Bill No. 11,662, proposed in 1936, but never passed, and the bill which became the law now under review. Legislative history 'cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms. * * * If the language be clear, it is conclusive.' *Peoples Natural Gas Co. v. Federal Power Comm.*, supra (127 F. 2d 159), quoted from *United States v. Shreveport Grain Co.*, 287 U. S. 77 at page 83, 53 S. Ct. 42, 77 L. ed. 175. Certainly the legislative history of a bill that was not adopted cannot be resorted to construe a bill that was.
>
> "It is quite plain that from the time the Lea Bill was introduced until the Natural Gas Act was passed, the ideas of the proponents of the legislation underwent considerable change. * * *"

On appeal the same DeVane material was submitted to this Court (see petitioner's brief *Interstate Natural Gas Co. v. Federal Power Commission*, Case No. 733, United States Supreme Court October Term 1946, pp. 35-39) and was neither relied on nor even mentioned by this Court in its unanimous opinion in that case. *Interstate Natural Gas Co. v. Federal Power Comm.*, 331 U. S. 682.

Also, in *Peoples Natural Gas Co. v. Federal Power Comm.*, 127 F. 2d 153 (1942), certiorari denied 316 U. S. 700, the DeVane material was presented to the Court of Appeals for the District of Columbia Circuit on petition for rehearing. See brief of FPC in Court of Appeals for Fifth Circuit in *Interstate Natural Gas Co. v. Federal Power Comm.*, page 39, no. 21, portions of which brief are printed in item V of the Appendix to this brief.

3. *In any event, the DeVane statements do not refer to sales for resale such as those by Phillips to the five interstate pipe line companies involved here.*

The FPC brief, pp. 45-46, states the testimony of Mr. DeVane establishes that H. R. 11662 was not intended to regulate the "gathering rate," which it claims is the rate paid to the gathering company by the interstate transmitting company. Phillips says it provides strong and persuasive evidence that it was believed the predecessor bill H. R. 11662 did not regulate the prices charged in the field by "independent producers and gatherers," Phillips brief p. 34. *That testimony does not support the claims made for it that it exempts Phillips.* Quoting from FPC brief pp. 45-6:

"Mr. LEA [Chairman of Subcommittee].

Mr. DeVane, I would like to go back just a moment. Of course, it is a question of regulation. Suppose that the A company owns a gas supply and the B company transmits it to another State, distributes it to a local company for distribution. Now suppose the question arises as to whether or not the charges which the A company makes against the B company for the gas is

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reasonable. What, if any, authority would the Commission have on that question, under this bill. Do you get my question?

"Mr. DeVANE. Yes; if I understand your question, *concerning the price paid to the A company, there is no control of the gathering rate;* the Commission would not have jurisdiction. That price is fixed by competitive conditions that exist in the field. But it matters not how many different ownerships there may be between the time gas starts to move in interstate commerce and gets to the city gates. Ownership might change a dozen times—A company sell to B, and B company sell to C—all those rates would be subject to regulation.

"Mr. LEA. Well, when the supply company is brought before the Commission in an action to regulate its rates, and they say, 'We have got to pay so much for gas; we cannot control that price which they charge us, and we have to charge a higher delivered price to the buyer.' Does the Commission have any power over that?

"Mr. DeVANE. No; *not the price that is paid to the gatherer,* to the man that produces it; that is binding if the transaction is at arm's length. If the transaction is not at arm's length, of course, its reasonableness may be inquired into, under the decisions of the Supreme Court. [Italics supplied.]"

It is perfectly obvious from the context that in the example given the A Company owns a gas supply which it sells at the well head. The FPC told this Court in a prior brief (brief in opposition to certiorari in *Interstate Natural Gas Company v. Federal Power Comm.,* 331 U. S. 682 (1947), No. 733 October Term 1946, p. 13-14), as follows:

"With respect to the legislative history of the Act, petitioner quotes at length from the testimony of Mr. Dozier DeVane, former Solicitor of the Federal Power Commission, in connection with the predecessor bill H. R. 11662, containing different jurisdictional provisions from that enacted. We do not contend that the legislative history of a predecessor bill may not be resorted to in a proper case, if necessary, as an aid to ascertaining the intention of Congress. It is submitted, however, that where, as here, the language of the Act is clear and the Committee reports on the final bill enacted are explicit on the questions at issue, statements of witnesses on a bill not enacted and not even reported are entitled to no weight and that therefore the court below proper relied upon the legislative history of the final bill enacted. *The statements of Mr. DeVane, however, when studied in the light of the actual facts as to H. R. 11662, not only do not support petitioner's contentions, but actually leave no doubt that sales of gas in interstate commerce for resale, even when made, as here, in the producing field, were intended to come within the jurisdiction of the Commission.*" [Emphasis supplied.]

The fact that the FPC has been on both sides of the fence on the question destroys the value of the DeVane statement as legislative history.

In any event Phillips is not in the position of the A company, but rather is in the position of the B company referred to in Mr. DeVane's testimony, *since it is undisputed that it buys about 50% of the gas it sells for resale in interstate commerce from producers in the field.* See facts pp. 6-7, *ante.* Further, by the time Phillips sells and delivers natural gas to the five pipeline companies for resale the gas has been and is being transported in high pressure mains so as to be within even the limited scope of the jurisdictional provisions of H. R. 11662.

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4. *The debates on the bill (H. R. 6586) support jurisdiction over Phillips.*

Petitioners' main reliance on the debates on this bill is with reference to certain statements of Senator Wheeler, to the effect that the bill affects "only those who sell at wholesale in interstate commerce." Phillips' brief, pages 43-44. However, petitioners erroneously assert that the "wholesale sales" referred to by Senator Wheeler refer only to sales for resale in interstate commerce by pipeline companies to distributing companies. We respectfully submit that the very language of the quotations from the debates supports a conclusion contrary to that of petitioners. Senator Wheeler unequivocally states that *wholesale* sales would be subject to regulation by the FPC, including those in the producing states. (See quotation pp. 64-5, *post*, this brief.) Senator Wheeler did not except wholesale sales like those made by Phillips to the five pipe line companies under the circumstances of this case. The unambiguous language of the Act does not permit of any such exception by implication.

h. Administrative interpretation is entitled to no weight in this case.

The briefs in opposition (FPC brief, p. 65, and Phillips' brief, p. 45) rely on the claim the FPC has uniformly interpreted the Natural Gas Act to exclude transportation and sale such as involved here, which alleged interpretation is claimed to be entitled to significant weight.

The doctrine of administrative construction cannot be invoked to work a result contrary to the plain provisions

of the statute, a result sought here. But in any event, the FPC has never adopted a consistent view on the question here presented to entitle its interpretation to any weight whatsoever. The FPC acknowledges this in its brief in this case when it says, pages 71-2:

> "Notwithstanding this uniform course of interpretation revealed by decided Commission cases, *there has been some uncertainty as to the applicability of the 'gathering' exception to the situation here involved.* * * *" (Emphasis supplied.)

The first case relied on to establish "administrative construction" is *Columbian Fuel Corporation,* 2 F. P. C. 200 (1940). The interpretation of the Natural Gas Act by the FPC in that case was disapproved in *Peoples Natural Gas Co. v. Federal Power Comm.,* (App. D. C.) 127 F. 2d 153 (1942), certiorari denied, 316 U. S. 700. In that case the Court said, page 155:

> "* * * We cannot disregard the plain language of the statute because the Commission at one time interpreted it narrowly,[7] * * *

---

[7]"In the Matter of **Columbian Fuel Corp.,** Opinion No. 48 (Docket No. G-143), 35 P. U. R., N. S. 3."

We next refer to *Interstate Natural Gas Co.,* 3 F. P. C. 416 (1943), where the FPC, in referring to the position of Interstate (which did not deny the sales involved to pipeline companies were sales of natural gas in interstate commerce for resale, but contended each was a sale in production or gathering and hence within the exemption in Section 1(b)) said after quoting the statutory language, pages 420-1:

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"The above-described sales to the three pipe line companies come within the scope of the specific affirmative provisions of section 1(b) of the Natural Gas Act and are clearly sales 'in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use.' It was such interstate wholesale sales which the United States Supreme Court had ruled were beyond the reach of the state commissions,[7] that Congress intended to regulate by the Natural Gas Act.

"The negative language in section 1(b) upon which the Interstate Company relies for its claimed exemption involving these sales provides that the Commission shall not have jurisdiction over 'the production or gathering of natural gas.' When the distinction between *production* and gathering of natural gas, and the *sale* of such gas in interstate commerce is kept in mind, effect is given to the Congressional objective.[8] The Commission is bound to obey the command of Congress to regulate these sales in interstate commerce for resale to the three pipe line companies. Such is clearly the implication of the decision of the Circuit Court of Appeals in *Peoples Natural Gas Co. v. Federal Power Commission*, 127 F. (2d) 153, cert. den. 316 U. S. 700.

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[7]H. Rept. No. 709, 75th Cong., 1st Sess., pp. 1-2; S. Rep. No. 1162, 75th Cong., 1st Sess., pp. 1-2; **Illinois Natural Gas Co v. Central Illinois Public Service Co.**, 314 U. S. 498, 503-506; **Federal Power Commission v. Natural Gas Pipeline Co.**, 315 U. S. 575, 582; **Kentucky Natural Gas Corp. v. Pub. Serv. Comm.**, 28 F. Supp. 509, 512, aff. 119 F. (2d) 417.

[8]For the distinction between production of a commodity and sales of such commodity in interstate commerce, see **Carter v. Carter Coal Co.**, 298 U. S. 238, 302-4."

The position of the FPC was sustained by the Court of Appeals for the Fifth Circuit (156 F. 2d 949) and this Court (331 U. S. 682). Its position as stated in the foregoing quotation is completely contrary to the position the FPC takes in this case.

Note also the comment in *Federal Power Comm. v. Panhandle Eastern Pipe Line Company*, 337 U. S. 498, 516-517, n. 25, which refers to the "uncertainty of opinion in the Commission as to the reach of the Act toward sales by independent producers and gatherers to natural-gas companies for transportation in interstate commerce."

Also in debate on the Kerr Bill (S. 1498, 81st Congress, 2d Session) Senator O'Mahoney stated that "the Federal Power Commission has wobbled all over the face of the earth with respect to this problem." 96 Cong. Rec., p. 4171.

i. There is no merit in petitioners' contention that the "gap" to be closed by enactment of the Natural Gas Act embraces only sales for resale in interstate commerce by a pipe line company to a distribution company, and impliedly excludes sales for resale to a pipe line company such as involved here.

There is no merit in petitioners' contentions based on the so-called three-part division of the industry (FPC brief, p. 29) that Congress intended only to regulate sales by the interstate pipe line companies and not sales for resale in interstate commerce made to a pipe line company by a company like Phillips at the production end of the line. This conclusion stems from the Federal Trade Commission Report of 1935 which we show, pages 50-51, is un-

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warranted. See quotations and discussion at pp. 50-51, *ante*, this brief.

This is a variation of the argument made at p. 39, Phillips' brief, and at pp. 56-57, FPC brief that the "gap" to be closed by enactment of the Natural Gas Act applies only to sales for resale by a pipe line company to a distribution company, and did not include sales for resale in interstate commerce by the so-called "independent producers and gatherers" at the production end of the pipe line.

In *Interstate Natural Gas Co. v. Federal Power Comm.*, 331 U. S. 682, after a review of the legislative history and ascertainment of the Congressional intent in adopting the Natural Gas Act, this Court specifically held (pp. 689-690) that the sales of natural gas "made in the field" by Interstate to three interstate pipe line companies for transportation across state lines and for resale for ultimate consumption were beyond the constitutional powers of the states to regulate, and (pp. 692-693) that the Natural Gas Act was enacted to regulate the rates for such sales. To the same effect see *Peoples Natural Gas Co. v. Federal Power Comm.*, (App. D. C.) 127 F. 2d 153 (1942), certiorari denied 316 U. S. 700. (Discussed at pp. 46-47, *ante*.)

There is also the following convincing authority that the constitutional "gap" to be closed also included wholesale sales made in producing states as well as in the receiving states. In addition to the indentical House and Senate Committee Reports on H. R. 6586, which became the Natural Gas Act (H. R. Rep. No. 709, 75th Cong., 1st Sess.; S. Rep. No. 1162, 75th Cong., 1st Sess.), which are

plain on their face," there is also the statement by Senator Wheeler on H. R. 6586 quoted at footnote 36 at page 63 of the Federal Power Commission brief:

> "Cf. the question by Senator Connally at p. 9314, 'if a man should produce gas in my State and ship it in interstate commerce, then he would have to sell it at the price fixed by the Commission?' to which Senator Wheeler replied, 'Exactly; at the wholesale price fixed by the Commission.' "

On June 7, 1938, there was printed in the Congressional Record a declaration of Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce and in charge of the bill, as to the "Necessity for Federal Regulation of the Natural-Gas Industry," 83 Cong. Rec. 2422 *et seq.*, which contains the following language, at page 2422:

> "The courts have held that sales for resale, or so-called wholesale sales in interstate commerce, are not subject to State regulation (*Missouri v. Kansas Gas Co.*, 265 U. S. 298 (1924); *Public Service Commission v. Attleboro Steam and Electric Company*, 273 U. S. 83 (1927); *East Ohio Gas Co. v. Tax Commission of Ohio*, 283 U. S. 465).
>
> *"Neither the sending nor receiving State may regulate the wholesale rates.* The consumption of natural gas in the States is secured for the most part through interstate transmission, and the cost thereof is a very material element in determining the price the local consumers must pay for their gas." [Emphasis supplied.]

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[19]The Senate Report is printed in the Appendix to this brief, pp. 13 to 70.

And at page 2424:

> *"Federal jurisdiction plus the jurisdiction of the several States should be so utilized and coordinated as to produce effective regulation and the termination of existing abuses to the end that there should be no unregulated twilight zone. Otherwise our system fails in a very crucial situation.*
>
> "This bill is designed to provide the necessary complement to State regulations * * *." [Emphasis supplied.]

j. The statutory term "gathering" cannot be expanded by expert opinion so as to cover sales for resale in interstate commerce by Phillips.

The FPC brief, pages 9-15, lays heavy emphasis on what it chooses to denominate the "industry meaning of 'gathering.'" By self-serving statements of its executives, which have been shaped to fit the exigencies of the situation, Phillips has made a transparent attempt to extend the concept of gathering to a convenient point where it could slip out from under the plain import of the decision in the *Interstate* case (331 U. S. 682). Significantly, no reference is made to any dictionary or text book definition. We submit no such references in support of their claims can be found. See definitions quoted, pages 39-41, *ante*.

In this brief we have reviewed the admitted facts, the legislative history, the fluctuating administrative interpretations and the decisions of this Court on what the Congress meant by "sale in interstate commerce of natural gas for resale for ultimate public consumption" and by "production

or gathering of natural gas" as used in Section 1(b) of the Act.

From the admitted facts, it is clear beyond doubt that the sales for resale by Phillips were made in interstate commerce (*ante*, pp. 8-9). It is also clear from the undisputed facts that these sales for resale in interstate commerce take place after the completion of "production or gathering of natural gas" (*ante*, pp. 37-43).

The Committee Reports on the Act state clearly and directly that the words "production or gathering of natural gas" are not included in the jurisdictional grant of power over sales for resale in interstate commerce (*ante*, p. 45), and that the Act fills the jurisdictional "gap" over sales for resale in interstate commerce which the States may not constitutionally regulate.

This Court's decision in the *Interstate* case (quoted *ante*, pp. 29-30) directly adopts this "gap" occupying function as concisely defining what falls within "production or gathering of natural gas" and what falls within sales for resale in interstate commerce. Therefore, the definition of what "production or gathering of natural gas" means under the Act is thus clearly and precisely defined by the Congress. And one seeking that meaning must confine his search to this deliberate Congressional use of the terms.

But finding the Congressional definition not to their liking, petitioners seek to create one of their own. They follow the novel idea of claiming that Congressional purpose is not clear—an idea already refuted herein—and then claiming that Phillips may use the opinions of self-serving experts, four of whom were Phillips' own employes, to

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so define "gathering" in a manner that would bring Phillips beyond the reach of the entire Act. And that such opinions (see FPC brief, pp. 9-17), expressed 12 years after the Act was adopted, are binding upon this Court.

The absurd extremes to which the testimony of the Phillips' executives reached is demonstrated by statements made on cross-examination that the use of gas for water heating and stove heating constituted "gathering"; that "gathering" extended to the burner tip; that the flaring of gas constituted part of gathering; and that a pipe extending 40 feet into the air used to flare gas was a "gathering" line. R. II. 622. Mr. Bunn testified that "gathering" included not only sale and delivery of natural gas, but also the billing and collection of the sale price. R. II. 673. At one point he predicated his opinion upon change of ownership, testifying that this had everything to do with determining the point where "gathering" ends. R. II. 638. He said if the gas were delivered, for example, at the *inlet* side of the Sherman Plant, Phillips' gathering would end at the fence line (R. II. 638-9), and therefore would not include the Sherman gasoline plant. This, in the face of testimony by the same witness that under the actual facts of the case, where the gasoline plant is owned and operated by Phillips, "gathering" extends through the plant and to the point of delivery to Michigan-Wisconsin and even included the sale. R. II. 677-8.

The foregoing (but a few instances selected from extensive testimony) characterizes the whole tenor of petitioners' so-called "expert testimony" on the alleged industry meaning of gathering.

To state petitioners' proposition is to demonstrate its fallacy. To adopt it means that every person faced with regulation needs only assemble some alleged "experts" who are willing to express opinions that language clearly applicable is inapplicable. Thus Phillips or any other employer of the "experts" goes free of regulation. And, in addition to being contrary to clearly expressed Congressional intent, Phillips' definition is contrary to the accepted text book and dictionary definitions (*ante*, pp. 39-41).

This Court has rejected testimony as to what others think Congress intended when that testimony is offered in litigation years after adoption of legislation. Even opinions of members of Congress are rejected when offered one, or three, or twelve years after the bill became law.[11] In *United States v. United Mine Workers*, 330 U. S. 258, this Court rejected opinions of members of the Congress as to the meaning of the Louis-LaGuardia Act, saying (p. 281):

> "We fail to see how the remarks of these Senators in 1943 can serve to change the legislative intent of Congress expressed in 1932 * * *."

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[11]Most significant is the fact that industry witnesses testifying in support of the Moore-Rizley and Kerr Bills took a contrary position as to the scope of production and gathering and the jurisdictional reach of the Act's over sales for resale in interstate commerce. See Hearings on H. R. 4051 before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 80th Cong., 2nd Sess. (1948), pp. 67-74, 357, 358, and Hearings on S. 1498 before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 81st Cong., 1st Sess. (1949), pp. 35, 79, 80, 81, 84, 85, 105, 107, 109, 149, 153, 154, 158, 160, 388, 412, 422, 427-434, 442-444, 453, 454.

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II.

COMMISSION JURISDICTION NOT EXCLUDED BECAUSE OF ALLEGED CONFLICT WITH STATE REGULATORY EFFORTS.

The claim that FPC jurisdiction over the sales for resale in question is excluded because of alleged conflict with state regulatory efforts is rested on *dictum* in *Interstate Natural Gas Co. v. Federal Power Comm.*, 331 U. S. 682, 690:

> "* * * Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach. * * *"

The foregoing *dictum*[11] does not, as assumed by petitioners, apply to the sales for resale in interstate commerce by Phillips to the 5 interstate pipeline companies here involved. Obviously, in employing the above language, this Court referred to "sales" which the states could constitutionally regulate. This is perfectly apparent when one refers to the language immediately preceding that quoted above at p. 690 of 331 U. S. including that where the Court said among the powers reserved to the states is the power to regulate physical production and gathering and

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[11]In the Court of Appeals the FPC relied on this dictum. They do not do so in this court, a significant indication that they do not now believe the position sound.

that: "It was the intention of Congress to give the States full freedom in these matters." 331 U. S. 682, 690. The states cannot constitutionally regulate the sales for resale by Phillips (pp. 30-34, *ante*), hence the foregoing principle as a matter of law does not apply. Further support for our position appears in *United States v. Public Service Comm. of California,* 345 U. S. 295, 311:

> "* * * Especially in the litigation arising under the Gas Act has this Court expressed the view that the limitations established on Commission jurisdiction therein were designed to coordinate precisely with those constitutionally imposed on the states. * * *"

In any event, there has been no sufficient showing of any conflict. Following the language in the *Interstate* case above quoted, this court said (331 U. S. 682, 690-1):

> "* * * But such conflict must be clearly shown. Exceptions to the primary grant of jurisdiction in the section are to be strictly construed." It is not sufficient to defeat the Commission's jurisdiction over sales for resale in interstate commerce to assert that in the exercise of the power of rate regulation in such cases, local interests may in some degree be affected."

"'"Cf. **Colorado Interstate Gas Co. v. Federal Power Commission, supra,** (324 U. S. at 603, 89 L. ed. 1223, 65 S. Ct. 829); **Federal Power Commission v. Hope Natural Gas Co.,** 320 U. S. 591, 607-612, 88 L. ed. 333, 347, 350, 64 S. Ct. 281 (1944)."

In *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission,* 341 U. S. 329, when the issue of dual regulation by the Michigan and FPC was before it, the Supreme Court said at p. 336:

"This court again reasserted the same doctrine in **United States v. Public Utilities Comm.,** 345 U. S. 295, 310.

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"** * There are no opposing directives and hence no necessity for us to resolve any conflicting claims as between state and federal regulation."

In any event, the record fails to show the existence of any conflict in fact. This is crystal clear from the detailed collection of the facts as stated pages 9-15, *ante.*[11]. *The brief filed by the intervening states of Texas, Oklahoma, and New Mexico fails to point to any specific conflict.*

The FPC brief states page 86:

"Commissioner Murray of Texas summarized this testimony in asserting that there is no jurisdiction the Commission might exercise over Phillips 'without conflict resulting' (R. II, 478-479). * * *"

This is an incorrect statement. The questions and answers appears pages 13-14, *ante.*

The FPC has regulated Panhandle Eastern Pipe Line Company producing gas in Texas and Oklahoma, Canadian River Gas Company, Natural Gas Pipe Line Company of America, and Cities Service Gas Company, all of which produce gas in Texas, and Southern Union Gas Company and El Paso Gas Company which produce gas in New Mexico, as well as other companies in the southwest. R. II, 698, 726-7. No "conflict" with the regulatory efforts of the states of Texas, New Mexico and Oklahoma was shown or claimed, and the state witnesses so testified. R. II. 478-489, 505-509, 539-546, 550-551, 584-587, 612. The testimony also shows that the FPC never issued any rules, regulations or

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[11]A full and accurate discussion of the facts also appears in the dissent of Commissioner Buchanan. R. V. 1788-1801.

orders which related to the production and gathering activities of natural gas companies reporting to the FPC. R. II. 697.

Oklahoma, which is the source of a relatively small portion of gas sold for resale in interstate commerce by Phillips to two of the five interstate pipeline companies involved in this record, is the only state which has adopted an order fixing a minimum price at which gas can be sold at the well head. As just stated, Texas and New Mexico have not adopted such orders, relying on "competition"[11] to fix field prices. Phillips' brief, p. 79; Texas et al. brief, p. 18.

In Phillips' brief it is said, p. 79:

> "* * * If, as in the case of Oklahoma, a state exercised its right to fix minimum prices in the producing field, the assertion of federal power over the same subject matter would create a situation in which two different regulatory agencies would be attempting to regulate the same transactions. * * *"

The statement erroneously assumes an attempt to regulate the "same subject matter," i.e. the same sale the Oklahoma order fixes a minimum price of gas at the well head. Here we are talking about entirely different sales for resale—to the 5 interstate pipeline companies in the States of Texas or New Mexico. See map item IV Appendix to this brief. The Oklahoma gas is gathered and transported across the state line into Texas where it is commingled with

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[11]Dependence on the "competition" theory to fix well head price is contrary to the conservation theory, since competition tends to drive prices down while the conservation theory is based on the proposition the higher the price the more conservation.

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other gas produced in Texas not later than at the Sherman and Hansford gasoline plants. There it is sold in interstate commerce for resale to Michigan-Wisconsin Pipe Line Company and Panhandle Eastern Pipe Line Company.

In any event, if there was a "conflict,"—which there is not here—a very recent decision holds that Federal Power Commission jurisdiction and ratemaking procedures made in exercise of that jurisdiction cannot be overridden by a state minimum price order. *State Corp. Comm. of Kansas v. Federal Power Comm.*, and *Northern Natural Gas Co. v. Federal Power Comm.*, (C. A. 8) 206 F. 2d 690 (1953) 706, certiorari denied 346 U. S. 922, rehearing pending.

The brief of Texas, et al., pp. 17-18, claims the Oklahoma minimum price order fixed the minimum price for Oklahoma gas Phillips sells Panhandle. Inasmuch as that sale for resale in interstate commerce takes place in Texas, it is difficult to see the basis for the claim Oklahoma can fix a minimum price with respect thereto.

The entire claim on conflict resolves itself down to the proposition that conservation of natural gas depends upon price and if the FPC were to fix a rate for the sales of gas by Phillips to the 5 interstate pipeline companies, the fixing of such price would affect state conservation efforts." R. V. 1745-1747. A similar view is taken by the petitioners. Phillips brief, pp. 73-85.

The claim is identical to that which has been presented to this court in two other cases and after careful consideration, expressly rejected. *Federal Power Comm. v. Hope Natural Gas Co.*, 320 U. S. 591 (1944), 607-9, 613-14; *Col-*

"The Federal Trade Commission Report of 1935 states, p. 612:
"Conservation concerns production rather than commerce."

orado Interstate Gas Co. v. Federal Power Comm., 324 U. S. 581, 600, 603. In *Interstate Natural Gas Co. v. Federal Power Comm.*, 331 U. S. 682, the same arguments as to alleged effect of FPC jurisdiction on state conservation efforts were presented in its argument by the State of Oklahoma (see 91 L. ed. 1742 at 1744) but were not accepted since the court sustained FPC jurisdiction. At most, unless and until the FPC fixes *a rate* which "conflicts" with state conservation efforts, we are simply talking about "possibilities" and no sufficient conflict is shown to prevent FPC jurisdiction as a matter of law.

Further, Commissioner Murray of Texas stated price would affect state conservation efforts only if they were unduly depressed (R. II, 452). Mr. Baumel of Texas based his answers on price and conservation on an assumption the price would be so low that costs could not be met (R. II, 570) and then stated he believed the FPC rate and other regulation to be fair (R. II, 572-3). Mr. Spurrier of New Mexico said a "profit was necessary; it should not be exorbitant" but could not say how much profit was necessary or what was "exorbitant" (R. II, 554, 557). Capshaw said there must be a "sufficient price" to justify drilling in marginal acreage wells but could not specify the price (R. II, 614) but that it was not the most important factor to be considered. There were others (R. II, 616-17).

The availability of markets through the construction of interstate pipe lines, and not price, was responsible in a large part for use of casing head or dry gas that might otherwise be flared (R. II, 492-531; 548-9; 559-60).

Even the assumption that FPC rate regulation will affect conservation is based on sheer speculation and hy-

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potheses. No witness could say what price level was necessary to afford conservation when consideration is given to the important part played by availability of market. The lower the price the more the demand and utilization of gas which avoids flaring. Yet as demand grows the price tends to rise. One is dependent upon the other, and on the present record one can only speculate as to what price will insure maximum conservation and whether any rate fixed by the FPC would not enable such price to be reached.

CONCLUSION

The decision of the Court below is correct and for reasons stated in this brief we submit the judgment under review should be affirmed.

Respectfully submitted,

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March 29, 1954.

MAR 29 1954
HAROLD B. WILLEY, Clerk

Nos. 280, 281, 418

IN THE

Supreme Court of the United States

OCTOBER TERM 1953

PHILLIPS PETROLEUM COMPANY, *Petitioner*,

v.

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN; CITY OF DETROIT, MICHIGAN; CITY OF KANSAS CITY, MISSOURI; CITY OF MILWAUKEE, a municipal corporation; COUNTY OF WAYNE, MICHIGAN; and THE FEDERAL POWER COMMISSION, *Respondents*.

STATE OF TEXAS AND THE RAILROAD COMMISSION OF TEXAS; CORPORATION COMMISSION OF OKLAHOMA; and STATE OF NEW MEXICO AND OIL CONSERVATION COMMISSION OF NEW MEXICO, *Petitioners*,

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APPENDIX TO JOINT BRIEF OF STATE OF WISCONSIN, PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL.

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FEDERAL POWER COMMISSION, *Petitioner,*

v.

STATE OF WISCONSIN, PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL., *Respondents.*

APPENDIX TO JOINT BRIEF OF STATE OF WISCONSIN, PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL.

APPENDIX I

Portions of Natural Gas Act (Act of June 21, 1938, ch. 556, 52 Stat. 821, as amended by Act of February 7, 1942, ch. 49, 56 Stat. 83, and Act of July 25, 1947, ch. 333, 61 Stat. 459, 15 U. S. C. §§717-717w) which are material to questions presented.

Section 1.

(a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 2. When used in this act, unless the context otherwise requires—

* * *

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

APPENDIX II

COMPARISON OF SECTION 1(b) in H. R. 11662 and H. R. 6586

H. R. 11662 Died with Session June 20, 1936 (Lea Bill 74th Cong., 2d sess., introduced March 6, 1936)

Section 1(b) The provisions of this Act shall apply to the transportation of natural gas in high-pressure mains in interstate commerce and to natural-gas companies engaged in such transportation, but shall not apply to the distribution of natural gas moving locally in low-pressure mains or to the facilities used for such distribution or to the production of natural gas; *Provided,* That nothing in this Act shall be construed to authorize the Commission to fix rates or charges for the sale of natural gas distributed locally in low-pressure mains or for the sale of natural gas for industrial use only.

H. R. 6586 Enacted June 21, 1938 (Lea Bill 75th Cong., 1st sess., introduced April 22, 1937)

Section 1(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

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APPENDIX V

Pages 9 to 46, page 76, and Appendix B of Brief for Federal Power Commission in Interstate Natural Gas Company, Incorporated v. Federal Power Commission, dated May 9, 1946 in No. 10701 in the United States Court of Appeals for the Fifth Circuit.

(*Note*: Due to the different size of type used in the footnotes of the brief of the Federal Power Commission, which size was unobtainable at the State of Wisconsin printing establishment, it was necessary to substitute bold face for italicized type.)

No. 10701

In the United States Circuit Court of Appeals for the Fifth Circuit

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INTERSTATE NATURAL GAS COMPANY, INCORPORATED,
PETITIONER

v.

FEDERAL POWER COMMISSION, LOUISIANA PUBLIC SERVICE COMMISSION, CITY OF NEW ORLEANS, LOUISIANA, CITY OF BATON ROUGE, LOUISIANA, RESPONDENTS

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

BRIEF FOR FEDERAL POWER COMMISSION

BRADFORD ROSS,
General Counsel,

CHARLES E. M'GEE,
Assistant General Counsel,

LOUIS W. M'KERNAN,

MILFORD SPRINGER,

HOWELL PURDUE,

Attorneys for the Federal Power Commission.

ARGUMENT

I

The sales made by Interstate to Mississippi, Southern Natural and United, for account of Memphis, being sales of natural gas in interstate commerce for resale for ultimate public consumption, are subject to the jurisdiction of the Commission and not exempt

The present proceeding is one under Section 5 (a) of the Natural Gas Act to determine and fix just and reasonable rates of Interstate, as a natural-gas company within the meaning of the Act, for sales of natural gas subject to the jurisdiction of the Commission.

As petitioner is an interstate pipeline company and admittedly a natural-gas company within the meaning of the Natural Gas Act,[*] the question here is whether the sales to the three companies in question are sales of natural gas subject to the jurisdiction of the Commission.

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[*] R. 24, 25. Cf. Petitioner's brief, pp. 4, 6, 7.

Although petitioner, on pages 11 and 12 of its brief, takes exception to certain of the Commission's findings establishing that the sales to Mississippi, Southern Natural, and United, for account of Memphis, here in question, are sales in interstate commerce for resale for ultimate public consumption, petitioner has admitted that the sales in question are sales in interstate commerce for resale and is bound by that admission.

In its reply brief before the Commission, Interstate, there respondent, said (page 18):

"Respondent admits that these sales are in interstate commerce."

The Commission in its opinion (R. 60) found that Interstate "successfully contended in a Federal Court that over 99% of its total sales of gas, which include sales made to the three pipe line companies, were sales in interstate commerce and beyond the reach of the Louisiana Commission. *Interstate Natural Gas Co.* v. *Public Service Commission*, 33 F. Supp. 50; 34 F. Supp. 980." The Commission further found as follows:

> Interstate does not now deny that the sales of natural gas to the three pipe line Companies constitute sales of natural gas in interstate commerce for resale, but it contends that each of these sales constitutes a sale in the "production and gathering" of gas and falls within the claimed exemption stated in Section 1 (b) of the Natural Gas Act.

Petitioner quotes this statement of its admission without

contradiction on page 24 of its brief in this Court and makes no contrary showing elsewhere. See also R. 849, 852, 859, 861.

The quotation from the opinion may, therefore, be taken as a fair and accurate statement of petitioner's position.

The petitioner contends that, although the sales in question are sales of natural gas in interstate commerce for resale which would otherwise be subject to the jurisdiction of the Commission, they are exempt as coming within the language of Sec. 1 (b) as "the production or gathering of natural gas."

Sec. 1 (b) of the Natural Gas Act provides:

> The provisions of this act *shall apply* to the transportation of natural gas in interstate commerce, to the *sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use,* and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other* transportation or *sale of natural gas* or to the local distribution of natural gas or to the facilities used for such distribution *or to the production or gathering of natural gas.* [Italics supplied.]"

The contention of the Commission is that its jurisdiction over sales of natural gas here depends on whether

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" It should be noted that it is not necessary in order that the Commission may have jurisdiction over a sale of natural gas in interstate commerce for resale that there be transportation in connection with such sale as implied by petitioner in its brief, since the grant of jurisdiction in subsection 1 (b) over transportation and sale is in the disjunctive.

the sales are sales of natural gas interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial or other uses as provided in Sec. 1 (b). The sales in question in the present case admittedly coming within that category and being separate and distinct from "the production or gathering of natural gas," are not within the exemption of "the production or gathering of natural gas," as stated in Sec. 1 (b) of the Natural Gas Act. Congress intended by the exemption to exclude the Commission from the field of direct regulation of the activity of "production and gathering of natural gas" presently occupied by the States, but it did not intend, by that exemption, to nullify the jurisdiction given the Commission in the Act to regulate interstate wholesale rates.

It is to be noted that subsection 1 (b) quoted above relates to two diverse sets of activities. (According to one set the provisions of the Act "shall apply to" and the other set they "shall not apply to." "The sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use" is an activity to which the provisions of the Act "shall apply." "The production or gathering of natural gas" is an activity to which the provisions of the Act "shall not apply." To give effect to the whole subsection, as the principles of construction require, *prima facie*, the two sets of activities should be mutually exclusive and non-overlapping, with the second set not intended to nullify the

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first, so that all may be given effect. Crawford, Statutory Construction (1940), p. 262.

The "production or gathering" clause, moreover, is in the nature of an exception and must be strictly construed. Horack, Sutherland Statutory Construction, 3rd ed., Vol. 2, sec. 4933, p. 471 and sec. 4936, p. 474. *Hartford Electric Light Company* v. *Federal Power Commission*, 131 F. 2d 953, 962; cert. den. 319 U. S. 741.

In the *Hartford* case, the Circuit Court of Appeals for the Second Circuit, said, on page 962, of sec. 201 (b) of the Federal Power Act, a clause similar to sec. 1 (b) of the Natural Gas Act:

> Regarding the "but" clause as an exception, and keeping in mind the obvious purpose of Congress, disclosed in the legislative history, to see to it that there was effective regulation of interstate wholesale sales of electric energy, we consider as pertinent the "elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed * * *." *Spokane & Inland R. R.* v. *United States*, 241 U. S. 344, 348, 350, 36 S. Ct. 668, 671, 60 L. Ed. 1037; cf. *Piedmont & Northern Ry.* v. *I. C. C.*, 286 U. S. 299, 311, 312, 52 S. Ct. 541, 76 L. Ed. 1115; *United States* v. *McElvain*, 272 U. S. 633, 639, 47 S. Ct. 219, 71 L. Ed. 451.
>
> We note that the Natural Gas Act, U. S. C. A., Title 15, § 717 (b) provides that that Act shall apply to the "transportation" of natural gas "in interstate commerce" or to the "sale in interstate

commerce of natural gas for resale"; the same sentence contains a "but" clause reading: "but *shall not apply* * * * to the local distribution of natural gas or to *the* * * * *production or gathering of natural gas.*" Yet, in *People's Natural Gas Co.* v. *Federal Power Commission, supra,*[11] a company engaged in the production of natural gas, but not in its interstate transportation, was held to be subject to the Act because, in the State of Pennsylvania, it sold gas to another company which transported the gas to another state for resale.

Cf. *Jersey Central Power & Light Co.* v. *Federal Power Commission,* 319 U. S. 61 and *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.,* 314 U. S. 498.

The phrase "production or gathering of natural gas" relates to two activities, "production" and "gathering."

"Production" is a separate and distinct activity and considered by itself alone is not interstate commerce in either the sense of transportation or sale. *Ohio Oil Company* v. *Indiana (No. 1),* 177 U. S. 190, 205-212; *Haskell* v. *Kansas Natural Gas Co.,* 224 U. S. 217, 220; *Champlin Rfg. Co.* v. *Commission,* 286 U. S. 210, 235. See also *West* v. *Kansas Natural Gas Co.,* 221 U. S. 229, 252, 253, 255. Cf. *Carter* v. *Carter Coal Company,* 298 U. S. 238, 302-304.

"Gathering" relates to the collecting of the gas from the various wells and bringing it into one place. Webster's

[11] **Peoples Natural Gas Co. v. Federal Power Commission,** 127 F. 2d 153, discussed at length below on pages 34 to 41.

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new International Dictionary, 2nd Edition (1939) so defines the word[12] and the trade or technical meaning of the term is the same as its usual or popular meaning.

"Gathering" is, in its nature, clearly transportation and not sale. Transportation and sale are separate and distinct activities. Transportation "comprehends any real carrying about or from one place to another."[13] Sale is a legal transaction involving the transfer of title to a purchaser.

The Supreme Court pointed out in its opinion in *Canadian River Gas Company* v. *Federal Power Commission*, 324 U. S. 581, 598:

> Transportation and sale do not include production or gathering.

The meaning of "production" and "gathering," therefore, cannot include sales in interstate commerce, since "production" cannot be "interstate commerce" and "gathering," being transportation, cannot include a sale.

(a) Legislative History

The conclusion of this analysis of the words "production" and "gathering" as used in Sec. 1 (b) of the Natural Gas

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[12] Cf. **Henderson Development Co.** v. **United Fuel Gas Co.**, 3 S. E. 2d 217 (W. Va.), where the definition is quoted in the same connection. Cf. definition in Louisiana Acts 1944, No. 132, § 1.

In the Monroe Field, line F-1 (See Appendices A and B) is, as was admitted by William A. Dougherty, attorney for Petitioner, "a header or reservoir". R. 467. The moment the gas enters the "header" it has certainly been "gathered."

[13] **Cunard S. S. Co.** v. **Mellon**, 262 U. S. 100, 121, 122. Cf. **State** v. **Redmond**, 237 P. 486 (S. Ct. of Mont.).

Act as not including sales of natural gas in interstate commerce for resale, such as those involved in the present case, is confirmed by the legislative history of the provision.

The Natural Gas Act, as enacted in 1938, follows closely Parts II and III of the Federal Power Act, enacted in 1935. The purpose of both acts was the same, namely, to supplement State regulation by providing for regulation by a Federal commission of the transportation and sale for resale *in interstate commerce* of electric energy and natural gas, which had been held by the Supreme Court of the United States not subject to regulation by the States.

The motivating cause of the enactment by Congress in 1935 of the Federal Power Act was the decision of the Supreme Court of the United States in the case of *Public Utilities Commission* v. *Attleboro Co.*, 273 U. S. 77 (1927), which held that rates for the interstate sale by a Rhode Island utility to a Massuchetts distributing company of electric energy transmitted in interstate commerce from Rhode Island to Massachusetts, the delivery taking place at the State line, could not be regulated by the State of Rhode Island. The case established that such interstate wholesale rates are not subject to regulation by the States but can only be regulated by Congress under the interstate commerce clause, thereby making necessary, to insure regulation, the passage of the Federal Power Act of 1935.

It was similarly held, with respect to natural gas, in *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298 (1923),

that the rates for the sale of natural gas at wholesale in interstate commerce in one state to distributing companies in another state cannot be regulated by either state.

This case, in conjunction with the *Attleboro* case, made the passage in 1938 of the Natural Gas Act necessary, since it was established by these decisions that the States could not regulate such wholesale sales of natural gas in interstate commerce and legislation by Congress was necessary to accomplish federal regulation."

The primary purpose of the enactment of the Natural Gas Act, as shown by its legislative history, was to regulate interstate transportation and/or sale of natural gas in interstate commerce for resale, which, under the afore-mentioned Supreme Court decisions, were not subject to state regulation, and not to regulate directly matters in the intrastate sphere, such as the conservation of natural gas, dependent upon the local regulation of production and gathering.

The Supreme Court of the United States in the case of *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, had held (January 7, 1935) unconstitutional certain attempted Federal regulation in the field of conservation of production

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" Title III of H. R. 5423, 74th Congress, 1st Session (February 6, 1935), entitled Transmission and Sale of Natural Gas, incorporated provisions generally similar to those contained in the Natural Gas Act of 1938. This proposed legislation was finally enacted August 26, 1935, in the form of the Public Utility Act of 1935, Title II of which was the Federal Power Act of 1935. Title III relative to natural gas failed of passage in 1935.

of oil under the National Industrial Recovery Act. This decision led to the enactment of the Connally "Hot-Oil" Act in 1935 (49 Stat. 30; 15 U. S. C. Sec. 715-715 (1), and its amendment in 1937 (50 Stat. 257), which was aimed at making effective state pro-ration and other laws relating to the conservation or production of oil. The 1937 amendment was under consideration by Congress at the same time as the Natural Gas Act and it is apparent that the status of the conservation problem at the time influenced the insertion of the "production and gathering" provision in Section 1 (b) of the Natural Gas Act as finally enacted in 1938.

The bills under consideration in Congress in 1935 did not contain any provision similar to the "production and gathering" provision of Section 1 (b) of the Natural Gas Act.

The phrase "production or gathering" in Section 1 (b) appeared for the first time in H. R. 12680, introduced in the House of Representatives May 12, 1936, by Congressman Lea of California.

The preceding bill, H. R. 11662, 74th Congress, 2d Sess., which was different from the law as enacted in its jurisdictional provisions and resembled the 1935 bills, did not contain the provision [18] in the present form but did

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[18] H. R. 11662 does, moreover, for the first time (in Section 11) contain the provisions of Sec. 11 (a) of the Natural Gas Act relative to state compacts regarding the conservation of natural gas resources, thus additionally recognizing potential state control in that sphere. See pages 24-27 below for a discussion of H. R. 11662 in an analysis of the testimony of Dozier A. DeVane in connection with that bill relied upon by petitioner.

contain an exemption of "the production of natural gas."

The report regarding H. R. 12680 made by the Committee on Interstate and Foreign Commerce of the House of Representatives (Report Number 2651, House of Representatives, 74th Congress, 2d Session) contains the following language on page 1 showing the primary intention of Congress:

> The main purpose of this bill is to provide for the regulation of the transportation and sale of natural gas in those cases in which the State regulatory bodies do not have jurisdiction.

This is supplemented by the following on page 2 of the Report:

> Under the decisions of the United States Supreme Court rates charged in interstate wholesale transactions may not be regulated by the States. Such transactions are defined in this bill to mean sales of natural gas for resale. The Commission is given no jurisdiction over local rates even where the natural gas moves in interstate commerce.
>
> * * * * *
>
> The bill takes no authority from State commissions and is so drawn as to be a complement, and in no sense an usurpation, of State regulatory authority and contains directions to the Federal Power Commission to receive and consider the views of State commissions.

The report further says on page 3:

> Subsection (b) confers jurisdiction upon the Commission over the transportation of natural gas

> in interstate commerce and the sale of such gas for resale to the public but does not apply to any other sale of natural gas, or deprive a State of any lawful authority now exercised over the distribution and sale of natural gas locally, and exempts from the jurisdiction of the Commission the sale of natural gas for industrial use only.

No statement is made, however, to the effect that any other sales of natural gas in interstate commerce for resale are exempt, as, for instance, being "production or gathering."

Several other bills[11] were introduced in 1937, prior to H. R. 6586, but they are without significance as to the question of interpretation here in issue, except that H. R. 4008 was the original form of H. R. 6586.

H. R. 6586, the bill which became the Natural Gas Act, was introduced by Representative Lea in the House on April 22, 1937, and on April 28, 1937 it was committed to the Committee of the Whole House on the State of the Union and ordered to be printed. This bill contains a subsection 1 (b), identical with subsection 1 (b) in the Natural Gas Act and the bill otherwise was the same as the Act finally enacted.

On April 28, 1937, the Committee on Interstate and Foreign Commerce of the House reported on H. R. 6586 (Re-

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[11] H. R. 4008, 75th Cong., 1st Sess., introduced in the House by Representative Lea, January 29, 1937; H. R. 5711, 75th Cong., 1st Sess., introduced in the House by Representative Crosser, March 17, 1937; S. 1919, 75th Cong., 1st Sess., introduced by Senator Brown in the Senate, March 17, 1937.

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port No. 709, 75th Cong., 1st Sess.). This report, which was incorporated verbatim in the report of the Senate Committee on Interstate Commerce, Report No. 1162, 75th Cong., 1st Sess., accompanying H. R. 6586, printed in full as Appendix B to this brief, shows conclusively that the narrower interpretation is to be placed upon the "production or gathering" provision of subsection 1 (b) and that it is not intended to detract in any way from the jurisdiction given the Commission over sales "in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and * * * natural-gas companies engaged in * * * such sale." The House report says on page 3:

> In view of the importance of section 1 (b), which states the scope of the act, it seems advisable to comment on certain provisions appearing therein. It wil be noted that this subsection of the bill, after affirmatively stating the matters to which the act is to apply, contains a provision specifying what the act is not to apply to, as follows:
>
> "but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."
>
> The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite

> the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill. That part of the negative declaration stating that the act shall not apply to "the local distribution of natural gas" is surplusage by reason of the fact that distribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers the Commission would have no authority over distribution, whether or not local in character."

The inescapable conclusion from the quoted statement in House Committee report on H. R. 6586 is that the Commission's jurisdiction over wholesale sales of natural gas in interstate commerce was intended to remain the same after the insertion of the "production or gathering" provision in subsection 1 (b) of the Act as it would have been had the "production or gathering" provision never been inserted.

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[11] Senator Wheeler, who was in charge of the bill in the Senate, summed up the matter well in the debate in the Senate on H. R. 6586 when he said (81 Congressional Record, Part VIII, August 19, 1937, p. 9312):

"Mr. WHEELER. It does not attempt under the provisions of the bill to regulate the producers of natural gas or the distributors of natural gas; only those who sell at wholesale in interstate commerce."

Senator Wheeler further said in the same debate (81 Congressional Record 9313): "There is no attempt and can be no attempt under the provisions of the law to regulate anything in the field except where it is not regulated at the present time. It applies only as to interstate commerce and only to the wholesale price of gas."

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The House report was incorporated verbatim in the Senate report (Appendix B to this brief), and the quoted statement was accordingly repeated and confirmed by the Senate Committee on Interstate Commerce, in reporting on H. R. 6586. No more authoritative statement from legislative history can be advanced than an unequivocal one appearing in the reports of both the House and Senate committees, reporting on the bill as enacted into law.

The House report, on pages 1, 2 and 3, contains the following statements clearly showing the paramount intention was to regulate all wholesale sales of natural gas in interstate commerce not capable of regulation by the States:

> The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in

> character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri* v. *Kansas Gas Co.* (1924), 265 U. S. 298, and *Public Service Commission* v. *Attleboro Steam & Electric Co.* (1927) 273 U. S. 83.) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act.
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> * * * * *
>
> The bill takes no authority from State commissions, and is so drawn as to complement and in no manner usurp State regulatory authority, and contains provisions for cooperative action with State regulatory bodies.
>
> * * * * *
>
> Your committee believes that this legislation is highly desirable to fill the gap in regulation that now exists by reason of the lack of authority of the State commissions.

Petitioner's brief (pages 34, 39-45) advances as the mainstay of its argument from legislative history certain statements made by Dozier A. DeVane, then Solicitor of the Federal Power Commission, in 1936 in testifying before the House Committee on Interstate and Foreign Commerce relative to H. R. 11662. These statements by Mr. DeVane, when rightly regarded in the light of the actual facts as to H. R. 11662, do not support petitioner's contentions.

H. R. 11662, 74th Cong., 2d Sess., was introduced in the House of Representatives on March 6, 1936, by Representative Lea of California. It differed fundamentally from

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H. R. 6586 and from the Natural Gas Act in its jurisdictional provisions.

The Commission's jurisdiction in H. R. 11662 was expressly limited to the transportation of natural gas in high-pressure mains in interstate commerce and natural-gas companies engaged in such transportation. The distribution of natural gas moving locally in low-pressure mains and the facilities used for such distribution and also the "production of natural gas" were exempt by express provision. It is to be noted that it was the "production of natural gas" which was exempt by this bill and not "production or gathering" as in the Natural Gas Act. As the Commission's jurisdiction was limited to the transportation of natural gas in high-pressure mains in interstate commerce, there was no need for exemption of gathering lines.

Sec. 1 (b) of H. R. 11662 provided as follows:

> (b) The provisions of this Act shall apply to the transportation of natural gas in high-pressure mains in interstate commerce and to natural-gas companies engaged in such transportation, but shall not apply to the distribution of natural gas moving locally in low-pressure mains or to the facilities used for such distribution or to the production of natural gas: *Provided*, That nothing in this Act shall be construed to authorize the Commission to fix rates or charges for the sale of natural gas distributed locally in low-pressure mains or for the sale of natural gas for industrial use only.

The rate sections of H. R. 11662, namely, sections 4 (b) and 5 (a), moreover, expressly limit the Commission's jurisdiction to rates or charges relating to any service rendered or to be rendered in connection with "the transportation of natural gas in high pressure mains in interstate commerce," whereas the Natural Gas Act gives the Commission jurisdiction as to all wholesale sales of natural gas in interstate commerce.

Mr. DeVane expressly referred to these provisions of H. R. 11662 in his testimony on page 24 of the hearings before the Subcommittee of the Committee on Interstate and Foreign Commerce of the House of Representatives on H. R. 11662, in saying: "The whole purpose of this bill is to bring under Federal regulation the pipe lines and to leave to the State commissions control over distributing companies and over their rates, whether that gas moves in interstate commerce or not."

When, on page 42 of the hearings, before Mr. DeVane made the statements referred to on pages 34 and 45 of petitioner's brief, it is to be noted Mr. DeVane first said that, where there was a series of sales beginning with the sale by an independent producer designated as A, the Commission would have jurisdiction over all the sales in interstate commerce subsequent to the sale by A. Mr. DeVane's exact statement is as follows:

> Mr. DEVANE. Yes; if I understand your question, concerning the price paid to the A company, there

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> is no control of the gathering rate; the Commission would not have jurisdiction. That price is fixed by competitive conditions that exist in the field. But it matters not how many different ownerships there may be between the time the gas starts to move in interstate commerce and gets to the city gates. Ownership might change a dozen times—A company sell to B, and B company sell to C—all those rates would be subject to regulation.

Moreover, it is to be noted that in the statements which are quoted on pages 44-45 of petitioner's brief, Mr. DeVane is using the term "gathering rate" as designating the price paid to the producer.

Statements made in hearings regarding the meaning of the dissimilar jurisdictional provisions contained in H. R. 11662, a bill not even reported by a Congressional committee, clearly can have no persuasive force as to the jurisdictional provisions of the Natural Gas Act, in which the Commission is given jurisdiction over transportation and sales of natural gas in interstate commerce for resale instead of over transportation of natural gas in high pressure mains in interstate commerce.

In any event, such general statements made by a former Solicitor or a former General Counsel[18] of the Commission are not persuasive here.

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[18] The statements of Charles V. Shannon, former General Counsel of the Commission, quoted on pages 33 and 34 of petitioner's brief, moreover, can have no more persuasive effect than the testimony of Dozier A. DeVane regarding H. R. 11662, upon which they are based. Mr. Shannon, it should be noted, was speaking of

The Commission is bound to the observance of the provisions of its jurisdictional statutes and is bound to follow their correct interpretation. It is well established law that the United States cannot be estopped into a wrong construction of a jurisdictional statute, even by official act of its officers. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409; *Niagara Falls Power Company* v. *Federal Power Commission,* 132 F. 2d 787, certiorari denied 320 U. S. 792, rehearing denied 320 U. S. 815; *Wilbur National Bank* v. *United States,* 294 U. S. 120, 123-124; *Pennsylvania Water & Power Company* v. *Federal Power Commission,* 123 F. 2d 155, 162-163, certiorari denied 315 U. S. 806; *Wilbur* v. *United States,* 281 U. S. 206, 217; see also *United States* v. *San Francisco,* 310 U. S. 16, 31-32.

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sales to pipe lines by "independent producers" and was commenting on the Supreme Court opinions in the cases of **Canadian River Gas Co.** v. **Federal Power Commission,** 324 U. S. 581 and **Panhandle Eastern Pipe Line Co.** v. **Federal Power Commission,** 324 U. S. 635. In the **Canadian River** case, no sales by "independent producers" were involved as Canadian River Gas Co. produced all its own natural gas, 3 F. P. C. 37. In the **Panhandle** case, where the "production or gathering" point was not raised, the gas purchased by Panhandle was purchased from producers at or near the well head, and the purchase price paid was allowed as an operating expense. The Supreme Court, however, abstained from any holding or dictum (see footnote 6 to the Supreme Court's opinion) as to whether the Commission had jurisdiction of such sales. Even if the Commission has jurisdiction, the price paid would be allowed as an expense item. Mr. Shannon's statement should be read in the light of the surrounding circumstances and in its context.

(b) Court Decisions

To begin with, the fundamental proposition is that no state can regulate the interstate wholesale sales of natural gas to Mississippi, Southern Natural, and United, for account of Memphis, here in issue.

There has been an actual holding that the State of Louisiana cannot regulate the three sales in question, *Interstate Natural Gas Company, Inc.* v. *Louisiana Public Service Commission,* 34 F. Supp. 980, (Cf. *Interstate Natural Gas Co., Inc.* v. *Louisiana Public Service Commission,* 33 F. Supp. 50). The holding that the sales in issue are sales in interstate commerce not subject to state regulation was sought by and obtained by petitioner itself. Cf. *State Tax Commission* v. *Interstate Natural Gas Co.,* 284 U. S. 41. This ruling of the federal courts involving the present sales is supported by other decisions of the Supreme Court of the United States to the effect that the state cannot regulate such interstate wholesale sales. *Missouri* v. *Kansas Gas Co.,* 265 U. S. 298, *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277, 280, *Pennsylvania* v. *West Virginia,* 262 U. S. 553, *Illinois Gas Co.* v. *Public Service Co.,* 314 U. S. 498, and *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.,* 317 U. S. 456. Cf. *Public Utilities Commission* v. *Attleboro Steam and Electric Co.,* 273 U. S. 83. See also *Kentucky Natural Gas Corporation* v. *Public Service Commission of Kentucky,* 28 F. Supp. 509, affirmed in *Public Service Commission of Kentucky* v. *Kentucky Natural Gas Corporation,* 119 F. 2d 417.

It would destroy the effectiveness of the Act and defeat the intent of Congress that there should be federal regulation of interstate wholesale sales of natural gas which are not subject to state regulation, to hold that the "production or gathering" provision in Section 1 (b) exempts from federal regulation interstate wholesale sales which cannot, under the Constitution, be regulated by the states." Sellers of natural gas in interstate commerce could easily avoid regulation as intended by the simple device of selling the gas in the field, if petitioner's contention were accepted. It is a fundamental rule of statutory construction that it cannot be presumed that the legislature will do a futile thing and further that statutes must be construed so as to achieve an effective and operative result. Horack, Sutherland Statutory Constructon, 3rd ed., Vol. 2, sec. 4510, p. 327.

The Petitioner has repeatedly implicitly accepted the interpretation of subsection 1 (b) here contended for by the Commission in matters arising before the Commission which it did not contest in the courts.

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[11] The State of Louisiana does regulate the "production" of natural gas in the interest of conservation. Dart, Louisiana General Statutes, Vol. 3, Chapters 5A-14, secs. 4741.11-4804. Louisiana also levies, in addition to a natural gas pipe-line tax, and a natural gas severance tax, a tax upon all persons engaged in gathering gas produced in the state. Dart, **Ibid.**, secs. 8787.18 to 8787.28 (Acts 1944, No. 132). "Gathering gas" is defined as "the first taking or the first retaining of possession of gas produced in Louisiana for transmission through a pipe-line after severance of such gas and after the passage of such gas through any separator, drip, trap or meter that may be located at or near the well."

By order dated April 28, 1942, in *Matter of Interstate Natural Gas Company, Inc.*, Docket No. G-218, the Commission found that Interstate Natural Gas Company, Inc., Rate Schedule FPC No. 15, and supplements thereto, was a rate schedule for a sale for resale in interstate commerce subject to the jurisdiction of the Commission and that Interstate was a natural-gas company under the Act. Interstate assented to the Commission's ruling. This rate schedule FPC No. 15, which is one of those involved in the present case, being Exhibit No. 11 (though not in issue in the petition for review) is for the sale of gas to United Gas Pipe Line Company with delivery at the inlet of Interstate's DeSiard Compressor Station situated near Fowler, Louisiana, not far from the Guthrie Compressor Station where the sale to United for account of Memphis, now in issue in the present case takes place. See Appendices C and D to this brief.

There is no material difference in the character of the sale between the sale and delivery to United Gas Pipe Line at the DeSiard Compressor Station and the sale and delivery to Memphis at the Guthrie Compressor and the latter is no more a part of "production or gathering" than the former. Yet Petitioner accepted the Commission's jurisdiction as to the former sale in connection with Docket No. G-218 and in the present case concedes the Commission's jurisdiction as to the former sale (Interstate Rate Schedule FPC No. 15) by accepting the rate reduction ordered by

the Commission as to this schedule in its order of April 27, 1943 (see page 7 of Petitioner's brief) though it contests the Commission's jurisdiction as to the latter (Interstate Rate Schedule FPC No. 6, Exhibit No. 12).

By an order of November 20, 1939 in Docket #G-146, the Commission suspended Interstate Rate Schedule F. P C. No. 4 (also here in issue), thereby further treating it as a rate schedule subject to its jurisdiction. By its order of April 20, 1940, in the same docket number (2 F. P. C. 727), the Commission ordered that the proposed increased rates and charges should not become effective, and that Interstate Rate Schedule F. P. C. No. 4 and supplements should continue in effect as in effect November 20, 1939, thereby further asserting its jurisdiction on that rate schedule. By order of June 14, 1940, in the same case (2 F. P. C. 766), the Commission denied an application for rehearing. The Commission then reopened the case and set it for further hearing (2 F. P. C. 770, 791) on the subject of affiliation between Interstate and Mississippi River Fuel Corporation through control by stock ownership by Standard Oil Company (New Jersey) and syndicate control.

The petitioner, however, contends that the Commission's opinion in *Matter of Columbian Fuel Corporation,* 2 F. P. C. 200, in which a rate suspension proceeding was dismissed by the Commission because the rates involved were for sales made by a producer and gatherer of natural gas at the termini of its gathering lines, is controlling.

A careful examination of the Commission's Columbian Fuel Corporation opinion and order discloses that the Commission strictly limited the scope of its decision:

First, it appears to have considered that Columbian Fuel was "a company engaged *exclusively* in the production and gathering of natural gas which also sold gas in interstate commerce for resale." (Emphasis supplied.) See majority opinion (2 F. P. C. 203) and the dissenting opinion (2 F. P. C. 212). On page 208, the opinion limits its decision to "persons whose only sales of natural gas in interstate commerce, as in this case, are made as an incident to and immediately upon completion of such person's production and gathering of said natural gas *and who are not otherwise subject to the jurisdiction of this Commission.*" (Emphasis supplied.)

Secondly, the opinion points out on page 208:

> Further experience with the administration of the Natural Gas Act may reveal that the initial sales of large quantities of natural gas which eventually flow in interstate commerce are by producing or gathering companies which, through affiliation, field agreement, or dominant position in a field, are able to maintain an unreasonable price despite the appearance of competition.

The Commission says that "under such circumstances the Commission will decide whether it can assume jurisdiction over arbitrary field prices under the present Act" or not.

The Columbian Fuel decision, therefore, is not persuasive in the present case:

(1) Because Interstate is not "engaged exclusively in the production and gathering of natural gas" and because it is "otherwise subject to the jurisdiction of this Commission" in that it is otherwise an interstate natural gas pipe line company and a natural-gas company under the Natural Gas Act. R. 58, 59, 81, 82.

(2) Because there is evidence as found by the Commission of "affiliation, field agreement, or dominent position in a field" R. 59, 63.

Administrative agencies such as the Federal Power Commission are not controlled by the principle of *res judicata* or *stare decisis,* but even if they were it could not be contended that the Columbian Fuel Corporation decision is applicable to the facts of the present case.

The Commission's opinion in the *Columbian Fuel Corporation* case, moreover, has been distinguished, and inferentially disapproved, by the United States Court of Appeals for the District of Columbia in *The Peoples Natural Gas Co.* v. *Federal Power Commission*, 127 F. 2d 153, on p. 155 (cert. den. 316 U. S. 700). The Court of Appeals there said, rejecting the same contention regarding the "production or gathering" provision urged by petitioner: "We cannot disregard the plain language of the statute because the Commission at one time interpreted it narrowly", citing *"In the Matter of Columbian Fuel Corp.*, Opinion No. 48 (Docket No. G-143), 35 P. U. R., N. S., 3."

Once *The Peoples Natural Gas Co.* case, *supra,* was decided holding that a sale of natural gas by the producing company (Peoples), delivered at the edge of the producing basin, upon completion of production and gathering, to New York State Natural Gas Corporation, which then transported the gas into another state and sold it to others for resale to ultimate consumers located in that state, was a sale of naural gas in interstate commerce for resale subject to the jurisdiction of the Commission, and not exempt by the provision in subsection 1 (b) relative to "production or gathering", the Commission was duty bound to following the principles of law laid down in that decision, regardless of implications to the contrary, if any, in its prior opinion in the *Columbian Fuel Corporation* case.

Certainly there was nothing arbitrary in thus following the decision of the United States Court of Appeals for the District of Columbia in *The Peoples Natural Gas Co.* v. *Federal Power Commission, supra,* nor any denial of due process as claimed by petitioner.

As was said by Justice Brandeis in delivering the opinion of the Court in *Georgia Public Service Commission* v. *United States,* 283 U. S. 765, at p. 775:

> It is not our province to inquire into the soundness of the Commission's reasoning, the wisdom of its decisions, or the consistency of its conclusions with those reached in similar cases.

Cf. *Youngstown Sheet and Tube Co.* v. *United States*, 7 F. Supp. 33, 36, aff. 295 U. S. 476, rehearing denied, 296 U. S. 661.

The *Peoples* case is on "all fours" with the case at bar. In the *Peoples* case, the natural-gas company produced and purchased gas, gathered, sold and delivered it within the producing basin or field in Pennsylvania to New York State Natural Gas Corporation, which then transported the gas into the State of New York for resale for ultimate public consumption. The exact question at issue in the present case also came before the United States Court of Appeals for the District of Columbia for decision in the case of *Peoples Natural Gas Co.* v. *Federal Power Commission*, 127 F. 2d. 153, certiorari denied 316 U. S. 700. In that case, the Commission filed a motion in the District Court of the District of Columbia to compel the company, as a natural-gas company, to obey the Commission's subpoena. The answer of Peoples challenged the jurisdiction of the Commission. The District Court gave judgment for the Commission on the pleadings. The Court of Appeals, in its opinion on page 157, found that "the motion asserted, and the answer did not deny, facts from which jurisdiction follows" and affirmed the lower court in ordering compliance with the subpoena. The Court of Appeals rejected the claim of The Peoples Company that the Commission was without jurisdiction because it appeared from the moving papers that Peoples sold natural gas at its Pew Compressor Station in Clarion County, Pennsylvania, allegedly in the

course of production and gathering, to New York State Natural Gas Corporation, an affiliated company, and that the latter immediately transported the natural gas into the State of New York, where it sold it to others for resale for ultimate public consumption. The Peoples Company contended (see page 155 of the opinion) that "the Natural Gas Act does not give the Commission jurisdiction over all sales of natural gas in interstate commerce."

The contention of Peoples that the Commission had no jurisdiction over its sale of gas to New York State Natural Gas Corporation at the Pew Compressor station was made in its answer to the Order to Show Cause in the case before the Commission, dated June 28, 1940, filed in the United States District Court as Exhibit "1" to its Answer and Points in that Court. Paragraph (1) (g) of the Answer to the Order to Show Cause alleged as follows: "The sale of gas by Respondent to New York State Natural Gas Corporation involves only the production and gathering of natural gas, which activities are specifically exempt from regulation * * * under the Natural Gas Act; and such sale does not involve any transportation of natural gas in interstate commerce or the 'sale in interstate commerce of natural gas for resale for ultimate public consumption' within the contemplation of the Natural Gas Act.[39]"

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[39] On page 8 of its brief in the Court of Appeals, the Peoples Company contended that Federal Power Commission lacked any conceivable jurisdiction, and that it is admittedly "without general jurisdiction," citing **Columbian Fuel Corporation,** 35 PUR (N. S.)

The Court of Appeals for the District of Columbia in its opinion rejected this contention of Peoples, pointing out on page 155 of its opinion:

> The sales thus described are sales in interstate commerce. Appellants urge that the Natural Gas Act does not give the Commission jurisdiction over all sales of natural gas in interstate commerce. But the Natural Gas Act does apply, among other things, to "the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use." That language exactly covers the sales discussed in Exhibit F. We cannot disregard the plain language of the statute because the Commission at one time interpreted it narrowly (here citing in a footnote *In the Matter of Columbian Fuel Corporation,* Opinion No. 48, Docket No. G-143, 35 P. U. R. (N. S. 3), or because the reports of Congressional committees

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3. It added that it was subject to complete regulation by Pennsylvania and that a State rate investigation was in process.

In the Company's reply brief, on pages 19-22, it was claimed that People's sells to other companies for resale a minor part of its gas, that the sale to New York State Natural in Pennsylvania for resale is completely regulated by the Pennsylvania Commission, and that Federal Power Commission is without authority to regulate matters subject to state regulations. It was also contended that the **Columbian Fuel Case** applied, adding that: "There the Commission held that it had no jurisdiction over a company which was engaged in producing and gathering natural gas in Kentucky and, at the termini of its gathering lines, selling that gas in Kentucky to another company which transported and resold the gas as in interstate commerce outside Kentucky. Nothing more is involved in this case" (P. 22).

> show an intention not to "disturb" state regulation, or because appellants fear duplicate regulation. The Act applies to "natural-gas companies engaged in such * * * sale," and defines "natural-gas company" as a company "engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

Again the Court of Appeals said in the *People's* case, on petition for rehearing,[11] at page 157 in making its holding denying the petition for rehearing:

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[11] On petition for rehearing in the Court of Appeals, the Company asserted (pp. 7-10) that sale by Peoples to New York State Natural "is in fact within a gathering field (after some degree of transportation involved in the mere 'production or gathering of natural gas' specifically exempted in Section 1 (b) of the Act)," and that this sale is not one "in interstate commerce." After a comprehensive collection of cases, the petition traces the steps leading to and through interstate transportation. On page 13 of the petition, the claim is made that "the next step in the process of commerce, after production or manufacture, is a wholly local sale, or series of sales, whereby the locally resident seller merely relinquishes title and possession without undertaking any part in interstate transportation. Interstate commerce * * * has not yet begun." On page 33 of the petition is quoted Mr. DeVane's testimony in the Hearings on H. R. 11662, 74th Congress, Second Session 1936, that the Commission had no jurisdicton under that bill over the "gathering rate" charged by a local gas supplier to a pipeline company which transports such gas into another State and sells it to a local distributing company. It is contended that the legislative history of the Act shows lack of Federal Power Commission jurisdiction over the sale involved. In concluding, the petition emphasizes on pages 37-38 that the facts pleaded specify a sale incident "to the production or gathering of natural gas" which is specifically excluded from Federal Power Commission jurisdiction by the express terms of Section 1 (b) of the Act, and without any further activity by Peoples. Furthermore, it is asserted that

> Appellants urge that the Company's sales to the New York company, for transportation to New York and resale, are not "sale(s) in interstate commerce" of natural gas for resale within the meaning of the Natural Gas Act. 15 U. S. C. A. § 717 et seq. Their position is not that Congress could not, but that it did not, authorize the Commission to regulate such sales. We think the position untenable.

The Peoples Company filed a petition for certiorari in the United States Supreme Court but the petition was denied." 316 U. S. 700.

The Peoples Natural Gas Company case decided by the United States Court of Appeals for the District of Columbia holds, therefore, that a sale of natural gas in interstate commerce to a pipe line company for resale for ultimate public consumption, similar to the sales here involved and bearing the same relation to "production or gathering," are sales of natural gas subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act and not exempt as "production or gathering" reserved to the States for regulation by Section 1 (b) of the Act.

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the sale to New York State Natural is incidental to Peoples' business of "producing and gathering natural gas, and, selling it locally; that the gas so sold is delivered at a point approximately 100 miles within the borders of Pennsylvania, within Appellant's producing field, and at the termini of Appellant's gathering lines; that this sale is completely regulated by the Public Utility Commission of Pennsylvania * * *."

" In the Peoples brief supporting its petition, all of the foregoing contentions were repeated, and the following language was used (p. 15):

"Under the terms of the Natural Gas Act exempting therefrom

It should be noted that the statement regarding the *Peoples* case on pages 31 and 32 in Petitioner's brief is thoroughly inaccurate in the light of the above statement of the facts.

The holding of the United States Court of Appeals for the District of Columbia in the *Peoples* case, as to which a writ of certiorari was denied by the United States Supreme Court, is further supported by the decisions of

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the production and gathering of natural gas, and the construction placed by the Commission itself upon that language of the statute In the Matter of Columbian Fuel Corporation, 35 PUR (N. S.) 3, it is of utmost importance that the sale to the New York State Natural Gas Corporation is made and the gas delivered at the edge of the producing basin, upon completion of the production and gathering of the gas."

In the Commission's brief in opposition to certiorari it is contended that (pp. 11-13): (1) it is settled that a sale of commodities for transportation and use in interstate commerce is a transaction "in interstate commerce." **Currin** v. **Wallace**, 306 U. S. 1, 10; **United States** v. **Rock Royal Co-op.**, 307 U. S. 533, 568-569; **Illinois Nat. Gas. Co.** v. **Central Ill. Pub. Serv. Co.**, 314 U. S. 498; (2) prior to enactment of the Gas Act, the sale of gas or electricity at wholesale in the state of origin for resale in another state was held to constitute interstate commerce beyond the reach of state regulation. **Missouri** v. **Kansas Gas Co.**, 265 U. S. 298; **Pub. Util Comm.** v. **Attleboro Co.**, 273 U. S. 83; cf. **Pub. Util. Comm.** v. **Landon**, 249 U. S. 236, 245; **United Fuel Gas Co.** v. **Hallanan**, 257 U. S. 277; **East Ohio Gas Co.** v. **Tax Comm.**, 283 U. S. 465, 470; **Peoples Gas Co.** v. **Public Serv. Comm.**, 270 U. S. 550, 554; (3) it is immaterial that the sale is made by the producer at the place of production. **Peoples Gas Co.** v. **Public Serv. Comm.**, 270 U. S. 550, 554; **East Ohio Gas Co.** v. **Tax Comm.**, 283 U. S. 465, 470; (4) if the Company claims that a sale of commodities for interstate transportation is no part of "interstate commerce" and that such commerce does not begin until the interstate movement begins, the argument is untenable. **Currin** v. **Wallace**, 306 U. S. 1, 10; **Lemke** v. **Farmers Grain Co.**, 258 U. S. 50, 55.

the Supreme Court in the cases of *Canadian River Gas Company* v. *Federal Power Commission,* 324 U. S. 581 and *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 324 U. S. 635.

Petitioner, on pages 52-53 of its brief, quotes dicta from the opinion of the Circuit Court of Appeals for the Tenth Circuit in the *Canadian River Company* case (142 F. 2d 943) favorable to its contention. The Circuit Court of Appeals dicta, of course, are not significant after the Supreme Court of the United States has handed down its decision and opinion in the same case."

It was contended by the natural-gas company in the *Canadian River Gas Company* case that the "production or gathering" provision in subsection 1 (b) of the Act meant that production and gathering properties of the company were to be excluded from its rate base and the cost of producing and gathering natural gas not allowed in its operating expenses.

The Supreme Court in rejecting this contention, on pages 597-598, said:

> It is pointed out that §1 (a) declares that "the business of transporting and selling natural gas" for ultimate distribution to the public is affected with a public interest and that federal regulation "in matters relating to the transportation of natural gas and the sale thereof" in interstate commerce is

" Curiously petitioner does not quote from the majority opinion of Supreme Court.

necessary in the public interest. *Transportation and sale do not include production or gathering.* Other sections emphasize the distinction. Thus § 4 and § 5, the rate regulating provisions of the Act, refer to charges for the "transportation or sale of natural gas, subject to the jurisdiction of the Commission." [Italics supplied.]

In making its ruling, the Court, on page 601, further said:

> When a natural-gas company which owns producing properties or a gathering system is restricted in its earnings by a rate order, the value of all of its property is affected. Congress of course *might have provided that producing or gathering facilities be excluded from the rate base and that an allowance be made in operating expenses for the fair field price of the gas as a commodity.* Some have thought that to be the wiser course. But we search the Act in vain for any such mandate. [Italics supplied.]

Of Canadian's argument that this was what was intended by Congress, the Court said (page 600):

> *This is precisely the argument which West Virginia, appearing as amicus curiae, advanced in the Hope Natural Gas Co. case. We rejected the argument in that case.* 320 U. S. pp. 607-615, particularly page 614, nt. 25, 64 S. Ct. 290-294, 88 L. Ed. 333. We have reviewed it here at this length in view of the seriousness with which it has been urged not only by

> Canadian but also by the Independent Natural Gas Association of America which appeared *amicus curiae*. But we adhere to our decision in the *Hope Natural Gas Co.* case and will briefly state our reasons. [Italics supplied.]

The Supreme Court's opinion concludes on this point (pages 602-603):

> That does not mean that the part of § 1 (b) which provides that the Act shall not apply "to the production or gathering of natural gas" is given no meaning. Certainly that provision precludes the Commission from any control over the activity of producing or gathering natural gas. For example, it makes plain that the Commission has no control over the drilling and spacing of wells and the like. It may put other limitations on the Commission. We only decide that it does not preclude the Commission from reflecting the production and gathering facilities of a natural gas company in the rate base and determining the expenses incident thereto for the purposes of determining the reasonableness of rates subject to its jurisdiction.

It is hardly proper to speculate on the probable complexion of the Supreme Court in the event that this case comes before it, as suggested by petitioner. Whatever Justice Jackson's reasoning in his concurring opinion in the *Canadian River* case may or may not lead to in its implications, the fact remains that he concurred with the majority of the court in allowing a rate determined on a rate base including production and gathering properties and by allowing as expense the cost of producing and

gathering the gas. The decision of the majority is clearly and logically bottomed on the strict interpretation of the "production or gathering" provision of subsection 1 (b) here contended for by the Commission and not on the broad interpretation adopted in the dissenting opinion written by the late Chief Justice Stone in the *Canadian River Company* case.

The same contention was made by the Panhandle Company in *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 324 U. S. 635, and was likewise rejected by the Supreme Court in that case in the following excerpt from its opinion (page 649):

> This phase of the case is controlled by *Canadian River Gas Co.* v. *Federal Power Commission,* supra. We need not repeat what we said there. It is clear that the value of producing properties and gathering facilities is affected whenever rates are fixed. That is inevitably true whether the leaseholds are put into the rate base or whether as petitioner urges the gas is valued as a commodity. That result is not avoided unless Congress puts a floor under production properties and gathering facilities of natural gas companies and fixes a minimum return on them. That Congress has not done. As Judge Sanborn aptly stated in the opinion of the Circuit Court of Appeals: "If there is an infirmity in the Commission's determination of the amount which should be included in the rate base as the cost or value of such

facilities, we think the infirmity arises from the method used in making the valuation, and not from any lack of jurisdiction." 143 F. 2d at page 495. Petitioner, moreover, failed to object in its application for rehearing before the Commission to the inclusion of its producing properties and gathering facilities in the rate base. It is accordingly precluded by § 19 (b) of the Act, from attacking the order of the Commission on the ground that they are included.

* * *

CONCLUSION

It accordingly is submitted that the Commission's orders under review should be affirmed, since

(1) The Commission had jurisdiction, and

(2) The Commission orders do not result in confiscation.

Respectfully submitted.

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MAY 9, 1946.

* * *

APPENDIX B

The Senate and House Committee Reports on the bill H. R. 6586, which became the Natural Gas Act, are identical so the Senate Report No. 1162, 75th Congress, 1st Session, is reproduced here for the convenience of this Court:

INTERSTATE TRANSPORTATION AND SALE OF NATURAL GAS

AUGUST 9 (calendar day, AUG. 11), 1937.—Ordered to be printed

Mr. WHEELER, from the Committee on Interstate Commerce, submitted the following

REPORT

[To accompany H. R. 6586]

The Committee on Interstate Commerce, to whom was referred the bill (H. R. 6586) to regulate the transportation and sale of natural gas in interstate commerce, and for other purposes, having considered the same, report thereon with a recommendation that it pass without amendment.

Report No. 709 on the bill (H. R. 6586) explains well and analyzes thoroughly the bill. The Committee on Interstate Commerce feel there is nothing they wish to add to this report which for the benefit of the Senate is herewith appended.

[H. Rept. No. 709, 75th Cong., 1st Sess.]

The Committee on Interstate and Foreign Commerce,

BLURRED COPY

to whom was referred the bill (H. R. 6586) to regulate the transportation and sale of natural gas in interstate commerce, and for other purposes, having considered the same, report thereon with a recommendation that it pass.

It was originally introduced as H. R. 4008.

GENERAL PURPOSES OF THE BILL

The bill is substantially identical with H. R. 12680 which, as amended, was reported by the Committee on Interstate and Foreign Commerce of the Seventy-fourth Congress, second session, with a recommendation that it pass. If enacted, the present bill would for the first time provide for the regulation of natural-gas companies transporting and selling natural gas in interstate commerce. It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been con-

sidered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri* v. *Kansas Gas Co.* (1924), 265 U. S. 298, and *Public Service Commission* v. *Attleboro Steam & Electric Co.* (1927), 273 U. S. 83.) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act.

In 1934, 24 States produced natural gas, and 35 States consumed it. The annual sale of natural gas in that year amounted to 1,764,988,000,000 cubic feet. The sale of this gas brought a revenue of $394,000,000. Of this amount, about $260,000,000 was in payment for gas transported in interstate commerce. During 1935 there was some increase in the pipe-line mileage and in the transportation of natural gas in interstate commerce.

The average price per thousand cubic feet for domestic use was 74.6 cents; for commercial use, 49.6 cents; and for all other industrial uses, 16.9 cents. This gas was consumed by 7,600,000 customers.

There are today substantially in excess of 50,000 miles of gas pipe lines in the United States. While natural gas has been in use for 50 years or more in this country, and while there was some transportation in interstate commerce prior to 1926, the substantial development in the industry has occurred since that year.

The bill provides for regulation of the exportation and importation of natural gas and authorizes the Commission to ascertain the cost of property used in rendering service; to direct extension or improvement of transportation facilities, and require the interconnection of facilities; to regulate the abandonment of service; to prescribe a uniform

system of accounts; to determine proper depreciation rates; to fix rates and charges for natural gas sold for resale for ultimate public consumption; to investigate compacts between the States; to compile information relative to the effect and operation of any compacts between the States; and to make investigations and report to Congress respecting the natural-gas industry. The bill takes no authority from State commissions, and is so drawn as to complement and in no manner usurp State regulatory authority, and contains provisions for cooperative action with State regulatory bodies. Mr. John E. Benton, general solicitor of the National Association of Railroad and Utilities Commissioners, and other representatives of State commissions and municipalities, appeared at the hearing before the committee in support of the bill.

The general attitude of the State regulatory commissions was indicated in a communication from Mr. Benton to the chairman, House Interstate and Foreign Commerce Committee, under date of March 29, 1937, enclosing a copy of a resolution adopted by the executive committee of the National Association of Railroad and Utilities Commissioners on March 26, 1937, as follows:

NATIONAL ASSOCIATION OF RAILROAD AND
UTILITIES COMMISSIONERS,
Washington, D. C., March 29, 1937.

Hon. CLARENCE F. LEA,
Chairman, House Interstate and
Foreign Commerce Committee,
Washington, D. C.

DEAR SIR: A joint meeting of the executive committee of this association and of the association's committee

on legislation was held on March 26, 1937, for the consideration of legislative matters.

The provisions of H. R. 4008 were considered for the purpose of determining whether that bill will provide regulation of the character requested in the resolution heretofore adopted by this association, and presented at the hearing on March 24, 1936. Consideration was also given to the situation existing in Illinois, where the Illinois Commission finds itself impeded by injunction proceedings in the Federal courts in its undertaking to discover what it costs the interstate pipe-line company to deliver gas in Illinois, although the commission is seeking that information only for the purpose of determining what the reasonable expenses of the local distributing company ought to be, and what price for gas sold in the Chicago areas should be approved by the commission as just and reasonable.

A resolution was unanimously adopted endorsing H. R. 4008, amended as requested on behalf of this association at the hearing on March 24. I attach a copy of the resolution hereto, and ask that it be printed as if presented at the hearing.

Yours very truly, JOHN E. BENTON,
General Solicitor.

"RESOLUTION ADOPTED BY THE EXECUTIVE COMMITTEE OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS ON MARCH 26, 1937

"*Resolved by the executive committee of the National Association of Railroad and Utilities Commissioners,* That the position of said association declared by resolution at its forty-seventh annual convention, in favor of the enact-

ment of Federal legislation providing for the regulation of the interstate transmission and sale of gas at wholesale for resale is hereby reaffirmed; and

"*Resolved further,* That for the purpose of providing such regulations said association endorses H. R. 4008, an act to regulate the transportation and sale of natural gas in interstate commerce, introduced by Congressman Lea, of California, with the amendments proposed thereto at the hearing before the House Interstate and Foreign Commerce Committee on behalf of the association on March 24, 1937; and

"*Resolved further,* That the necessity for such regulation is increasingly imperative, and that the enactment of H. R. 4008, amended as proposed, at the present session of Congress is earnestly urged on behalf of said association."

The bill provides for regulation along recognized and more or less standardized lines. There is nothing novel in its provisions, and it is believed that no constitutional question is presented.

Your committee believes that this legislation is highly desirable to fill the gap in regulation that now exists by reason of the lack of authority of the State commissions.

In view of the importance of section 1 (b), which states the scope of the act, it seems advisable to comment on certain provisions appearing therein. It will be noted that this subsection of the bill, after affirmatively stating the matters to which the act is to apply, contains a provision specifying what the act is not to apply to, as follows: "but

shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however, unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill. That part of the negative declaration stating that the act shall not apply to "the local distribution of natural gas" is surplusage by reason of the fact that distribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers the Commission would have no authority over distribution, whether or not local in character.

It was urged in connection with earlier bills that there should be inserted at the end of this subsection a proviso as follows:

"*Provided,* That nothing in this Act shall be construed to authorize the Commission to fix the rates or charges to the public for the sale of natural gas distributed locally."

In order to avoid misunderstanding the committee thought it necessary to omit this proviso from the present bill for the following reasons, even though there is entire agreement with the intended policy which would have prompted its inclusion: First, it would have been surplusage if interpreted as it was intended to be interpreted, and,

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second, it would have been, in all likelihood, a source of confusion if interpreted in any other way. For example, it was felt that in the effort to find a reason for its inclusion it might have been argued that it exempted sales to a publicly owned distributing company, and such an exemption is not, of course, intended. It is believed that the purposes of this proviso, assuming the need for any such provision, are fully covered in the present provision by the language—"but shall not apply to any other * * * sales of natural gas."

SECTIONAL ANALYSIS OF THE BILL

Section 1. Necessity for Regulation of Natural-Gas Companies

Subsection (a) contains a declaration of policy, states the necessity for Federal regulation, and defines the scope of that regulation. The subsection declares that the business of transporting and selling natural gas in interstate and foreign commerce for ultimate distribution to the public is affected with a public interest.

Subsection (b) confers jurisdiction upon the Commission over the transportation of natural gas in interstate commerce and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use.

Section 2. Definitions

This section contains definitions of (1) "person," (2) "corporation," (3) "municipality," (4) "State," (5) "natural gas," (6) "natural-gas company," (7) "interstate commerce," (8) "State commission," and (9) "Commission"

and "Commissioner." The definitions as they appear are self-explanatory and necessary to the proper administration of the bill.

Section 3. Exportation or Importation of Natural Gas

This section provides that after 6 months from the date of enactment no person may export or import natural gas without express approval of the Commission, such approval to be granted unless such exportation or importation will not be consistent with the public interest.

Section 4. Rates and Charges; Schedules; Suspensions of New Rates

Subsection (a) imposes upon natural-gas companies the duty of charging just and reasonable rates; and, under the provisions of subsection (b), undue preferences or advantages are prohibited.

Subsection (c) requires the filing of schedules and contracts relating to all rates and charges subject to the jurisdiction of the Commission; and, under the provisions of subsection (d), no change may be made in such rates except after 30 days' notice.

Subsection (e) authorizes the Commission to hold hearings concerning the lawfulness of any proposed change in rates, and to suspend such rates for not over 5 months, pending such hearing. If the Commission investigation has not been completed before the rates go into effect, the Commission may require the natural-gas company to make refunds if the increase is not approved; and it is provided that adequate bond be furnished to that end. The burden of proof is placed upon the natural-gas company to justify any increase in rates, and the hearing and decision of such

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matters is given preference over other matters pending before the Commission.

Section 5. Fixing Rates and Charges; Determination of Cost of Production or Transportation

Subsection (a) authorizes the Commission, after a hearing initiated by it, or upon complaint, to fix charges and reasonable rates for any transportation or sale subject to its jurisdiction.

Subsection (b) authorizes the Commission upon its own motion, or upon the request of a State commission, to investigate and determine the cost of production or transportation of natural gas in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. This subsection applies only to cases involving transportation of natural gas in interstate commerce and will greatly aid State commissions in their rate-making proceedings.

Section 6. Ascertainment of Cost of Property

Subsection (a) authorizes the Commission to investigate and ascertain the actual legitimate cost of property, depreciation, and other necessary facts for rate-making purposes.

Subsection (b) requires every natural-gas company upon request to file with the Commission an inventory of its property, and a statement of the original cost thereof, and to keep the Commission informed regarding additions, betterments, extensions, and new construction.

Section 7. Extension of Facilities; Abandonment of Service

Subsection (a) authorizes the Commission to direct a natural-gas company to extend or improve its facilities, and to establish physical connection and sell natural gas to any person or municipality engaged, or legally authorized to engage, in the local distribution of natural or artificial gas to the public, upon a finding that such an action is necessary or desirable in the public interest, but does not give the Commission authority to compel such extension or establishment of physical connection when to do so would impair the ability of the natural-gas company to render adequate service to its existing customers or involve the enlargement of transportation facilities.

Subsection (b) requires approval of the Commission by any natural gas company desirous of abandoning any or all of its facilities subject to the jurisdiction of the Commission. The Commission is authorized to approve such abandonment if it finds that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted or that the present or future public convenience or necessity permits such abandonment.

Subsection (c) provides that no natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being serviced by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market without a certificate of public convenience and necessity from the Commission. There is a

proviso that a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying the increased market demands in the territory in which it operates. There are similar provisions requiring certificates of public convenience and necessity for extensions of service in the Interstate Commerce Act (U. S. C., 1934, title 49, sec. 1 (18-20)); the Communications Act of 1934 (U. S. C., 1934, title 47, sec. 214), and the Motor Carriers Act (U. S. C., 1934, title 49, secs. 306, 307, 308).

Section 8. Accounts, Records, and Memoranda

Subsection (a) requires natural-gas companies to make and keep such accounts, records, and memoranda as the Commission may direct. However, natural-gas companies are not relieved by this subsection from the duty of keeping such accounts as may be prescribed under the laws of any State.

Subsection (b) authorizes the Commission to inspect and examine accounts, records, and memoranda of natural-gas companies and to have access to the premises of such companies when necessary for that purpose.

Subsection (c) subjects the accounts of any person who controls, directly or indirectly, a natural-gas company, subject to the Commission's jurisdiction, to examination by the Commission.

Section 9. Rates of Depreciation

The Commission is authorized to require proper depreciation accounting and to determine and fix adequate depreciation rates, such rates to include amortization. The

depreciation charges which a State commission may fix for rate purposes would not be affected by this section.

Subsection (b) requires the Commission to receive and consider the views of State commissions before prescribing depreciation rates.

Section 10. Periodic and Special Reports

The Commission by this section is authorized to require periodic and special reports which may be necessary for the proper administration of the act, and prescribe the manner and form in which the reports shall be made. It is declared to be unlawful for any person willfully to hinder or obstruct the making or filing of any information, report, or account required to be made, filed, or kept by the Commission.

Section 11. State Compacts; Reports on

Subsection (a) imposes the duty upon the Commission to assemble pertinent information with reference to the subject matter of any proposed compacts between two or more States, and requires the Commission to make such information public and report the same to the Congress, together with such recommendations for further legislation as appear to be appropriate or necessary to carry out the purposes of such proposed compact and to aid in the conservation of natural-gas resources within the United States.

Subsection (b) requires the Commission to assemble and keep current pertinent information with respect to the effect and operation of any compact between the States heretofore or hereafter approved by the Congress, and to make such information public and report to the Congress

and make such legislative recommendations as are appropriate to promote the purposes of such compact.

Subsection (c) authorizes the Commission to avail itself of the services, records, and information of the various departments and agencies of the Government, and authorizes the President to direct that such services and facilities of such agencies be made available to the Commission.

Section 12. Officials Dealing in Securities

This section makes unlawful personal profit by an official or a director of a natural-gas company through the negotiation, hypothecation, or sale of any security issue by any such company.

Section 13. Complaints

Under this section any State, municipality, or State commission may complain to the Commission of anything done or omitted to be done by any natural-gas company in contravention of the provisions of the bill.

Section 14. Investigations by Commission; Attendance of Witnesses; Depositions

The Commission is authorized by subsection (a) to investigate any violation of the provisions of the Natural Gas Act, and may make available to State commissions and municipalities any information concerning the matters to which the bill relates.

Subsection (b) provides that the Commission may, after a hearing, determine the adequacy or inadequacy of the gas reserves held or controlled by any natural-gas company or by anyone on its behalf, including its owned or

leased properties or royalty contracts, and may also, after hearing, determine the propriety and reasonableness of the inclusion in operating expenses, capital, or surplus, of all delay rentals or other forms of rental or compensation for unoperated lands and leases.

Subsections (c) and (d) provide for the issuance of subpenas and the attendance of witnesses, and in the event of refusal to attend or produce books or records, the Commission is given recourse to the courts. A willful failure to attend as a witness or to produce books or records is made a misdemeanor, punishable by fine of not more than $1,000 or imprisonment of not more than 1 year, or both.

Subsections (e), (f), and (g) authorize the taking of testimony by deposition, either in the United States or in a foreign country. Witnesses before the Commission and witnesses giving depositions as well as the person taking the deposition are entitled to the same fees as are paid for like services in the courts of the United States.

No person is excused from giving testimony because it may be self-incriminating, but under subsection (h) the person so testifying may not thereafter be subject to any penalty or forfeiture for or on account of any transaction or thing concerning which he is compelled to testify or to produce evidence. This exemption does not, however, relieve a party from prosecution for perjury.

Section 15. Hearings; Rules of Procedure

Subsection (a) provides that hearings under the Natural Gas Act may be held before the Commission or any member or representative designated by the Commission. It

authorizes the Commission to admit as a party to any proceeding any interested State, State commission, municipality, or private party in accordance with such rules and regulations as the Commission may prescribe.

Subsection (b) authorizes the Commission to adopt rules of practice and procedure governing all its hearings and proceedings. It provides also that no informality in any proceeding shal linvalidate an order or regulation issued under the authority of the act.

Section 16. Administrative Powers of Commission; Rules, Regulations, and Orders

This section contains a general grant of administrative powers to perform necessary acts, issue orders, rules, and regulations and prescribe the form of documents to be filed with the Commission.

Section 17. Use of Joint Boards; Cooperation with State Commissions

Subsection (a) provides that the Commission may refer any matter arising in the administration of the act to a board to be composed of a member or members from the State or each of the States affected or to be affected by such matter.

Subsection (b) authorizes the Commission to confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications and regulations of natural-gas companies, and to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act.

Subsection (c) provides that the Commission shall make

available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies, and further provides that the Commission may, when it can do so without prejudice to the efficient and proper conduct of its affairs, make available to a State commission, upon request, any of its trained rate, valuation, or other experts, as witnesses subject to reimbursement of their compensation and traveling expenses.

Section 18. Appointment of Officers and Employees

This section authorizes the Commission to appoint experts without regard to civil-service laws and other employees subject to the civil-service laws, and to fix salaries in accordance with the Classification Act of 1923.

Section 19. Rehearings; Court Review of Orders

Subsection (a) authorizes parties to a proceeding before the Commission to apply for a rehearing within 30 days after the issuance of an order by which such party is aggrieved. The Commission is given power to abrogate or modify its order upon such application. Unless it acts upon the application within 30 days, the application may be deemed to have been denied. No proceeding for court review of an order of the Commission is to be brought unless an application for rehearing shall have been filed.

Subsection (b) provides for review of the Commission's orders by the circuit courts of appeals and the Court of Appeals of the District of Columbia. No objection to any order is to be considered by the court unless it was urged before the Commission in the application for rehearing, unless there was reasonable ground for failure to raise it

on the application. Findings of the Commission as to the facts, if supported by substantial evidence, are made conclusive, but the court may upon application order additional evidence to be taken before the Commission. The judgment of the court is subject to review by the Supreme Court of the United States upon certiorari or certification.

Section 20. Enforcement of Act; Regulations; and Orders

This section authorizes the Commission to bring a civil action in the proper district court to enjoin acts or practices in violation of the act or any rule, regulation or order thereunder and to enforce compliance therewith.

Subsection (b) confers upon the courts of the United States jurisdiction to issue writs of mandamus commanding compliance with the act and rules, regulations, or orders thereunder.

Subsection (c) authorizes the Commission to employ such attorneys as it needs for its legal work.

Section 21. General Penalties

Subsection (a) imposes a criminal penalty of fine, imprisonment, or both upon any person who willfully and knowingly violates the provisions of the act.

Subsection (b) provides for a fine for violations of the rules, regulations, and orders issued under authority of the act.

Section 22. Jurisdiction of Offenses; Enforcement of Liabilities and Duties

This section imposes appropriate jurisdiction upon the courts of the United States over cases arising under the act.

Section 23. Separability of Provisions

This is the usual separability section saving the rest of the act in case of a decision holding any part invalid.

Section 24. Short Title

The act may be cited as the "Natural Gas Act".